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No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

Cuban American Bar Association, Inc., et al.,
Petitioners,

VS.

Warren Christopher, Secretary of State, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decisions in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390 (1994) (requiring vacatur "where mootness results from the unilateral action of the party who prevailed in the lower court") and *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) (vacating as moot an appeals court opinion regarding refugees indefinitely detained at the U.S. Naval Base at Guantánamo) require vacatur of the decision below, which has been rendered moot by the Government's unilateral decision to parole all Cuban refugee plaintiffs from Guantánamo into the United States.

PARTIES TO THE PROCEEDINGS

The petitioners are the plaintiffs in the case below: Cuban American Bar Association, Inc. ("CABA"); Cuban Legal Alliance, Inc.; Due Process, Inc. (hereinafter collectively "CRSO [Cuban Refugee Service Organization] Petitioners"); Lizbet Martínez; Arianna González Nobaez; Arniel del Campo González; Jovani Miguel Fiffe Pino; Nestor Rodríguez Labori; Nelson Torres Pulido; Maritza Exposito; David Buzzi; Alberto Rodríguez García; Leydis Milagros Ruíz Menéndez (hereinafter collectively "Detainee Petitioners"); Elena Pino; and Virginia Pérez (hereinafter collectively "Family Sponsor Petitioners"); on behalf of themselves and all others similarly situated.

The named Respondents are the defendants in the case below: Warren Christopher, Secretary of State; William H. Perry, Secretary of Defense; Janet Reno, Attorney General; Brigadier General Michael Williams, Commander, Joint Task Force at United States Naval Base, Guantánamo Bay, Cuba; Doris Meissner, Commissioner, Immigration and Naturalization Service; and the Immigration and Naturalization Service.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Cuban American Bar Association, Inc. and the remaining CRSO Petitioners, Detainee Petitioners, and Family Sponsor Petitioners hereby petition for a writ of certiorari to vacate and remand the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Court of Appeals' opinion at issue here, *Cuban American Bar Ass'n, et. al. v. Christopher, et al.*, is reported at 43 F.3d 1412 (11th Cir. 1995). App. at 1a. The District Court's opinions on the questions presented here (App. at 33a) have not been reported.

JURISDICTION

The opinion and order of the Panel below, reversing the District Court's temporary restraining order in favor of

Petitioners ("TRO"), was issued on January 18, 1995. The Court of Appeals did not issue the mandate forthwith, because the Petitioners timely filed a suggestion for rehearing *en banc*, which the Court of Appeals denied on April 18, 1995. On April 27, 1995, the Court of Appeals issued its judgment as mandate for Case Nos. 94-5138, 94-5231 and 94-5234, vacating the District Court's orders and remanding the cases with directions to dismiss the plaintiffs' claims.[1]

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2106. This petition seeks vacatur of the Panel's Opinion and Order of January 18, 1995, and judgment of April 27, 1995, which dissolved the TRO entered by the District Court with instructions to dismiss Petitioners' claims.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners seek vacatur pursuant to 28 U.S.C. § 2106. Petitioners' Verified Complaint alleged violations, *inter alia*, of the First and Fifth Amendments of the United States Constitution; Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees (the "1951 Convention"); the Refugee Act of 1980 and the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5); and the Cuban

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[1] The Haitian Refugee Center ("HRC") and several Haitian individuals then being detained on Guantánamo sought to intervene in this suit before the District Court, which provisionally granted their permissive intervention. The Provisional Haitian intervenors appeared before the Court of Appeals, but did not seek rehearing of the Panel decision, instead filing their Petition for Certiorari with this Court on March 31, 1995. On May 31, 1995, the Petitioners here filed a brief in response to the HRC's Petition. This Court denied HRC's Petition on June 19, 1995. *See Haitian Refugee Center v. Christopher*, 63 U.S.L.W. 3884 (U.S. June 19, 1995) (No. 94-1611).

Democracy Act, 22 U.S.C. § 6001, *et seq.* The relevant text of these provisions is set forth in the Appendix. App. at 46a-48a.

STATEMENT

This petition arises from litigation challenging Respondents' indefinite detention of approximately 32,000 Cuban refugees (including women and children) in U.S.-controlled offshore detention camps primarily at the U.S. Naval Base in Guantánamo Bay, Cuba, territory subject to exclusive United States jurisdiction and control.[2] Since

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[2] Since 1903, the United States has maintained a perpetual lease of the Naval Base of Guantánamo Bay. Agreement Between the United States and Cuba, Feb. 16, 1903. "Thus, it is clear that at Guantánamo Bay we have a Naval reservation which, for all practical purposes, is American territory. Under the foregoing agreements [the 1903 agreement and the supplementary Treaty of 1934], the United States has for approximately fifty years exercised the essential elements of sovereignty over this territory, without actually owning it." Commander B.D. Varner & Daniel Koze, Chief Journalist, USN, *The History of Guantanamo Bay* 7 (3d ed. 1964).

Similarly, "[f]rom 1904 to 1979, the United States exercised sovereignty over the Panama Canal and the surrounding 10-mile-wide Panama Canal Zone under the Isthmian Canal Convention, 33 Stat. 2234. On September 7, 1977, the United States and Panama signed the Panama Canal Treaty . . . transferr[ing] to Panama sovereignty over the Canal and Zone, but gave the United States the right to operate the Canal until December 31, 1999." *O'Connor v. United States*, 479 U.S. 27, 28 (1986). Because the Panamanian armed forces were entirely disbanded upon the United States invasion of 1989, *see* Lieutenant Colonel John T. Fishel and Major Richard D. Downie, *Taking Responsibility for our Actions? Establishing Order and Stability in Panama*, MILITARY REV. 66-67 (April 1992), the United States still exercises exclusive *de facto* control until 1999 over the Canal and all adjacent areas, where some Cuban detainees were temporarily held. In early 1995, all Cuban refugees in Panama were transferred to Guantánamo.

1959, the United States has uniformly condemned Fidel Castro's "repressive, totalitarian regime" in Cuba. App. at 49a. Under the Cuban Adjustment Act of 1966, the Refugee Act of 1980, the Cuban Democracy Act of 1992, and the unbroken executive policy of nine administrations, for decades the U.S. Government consistently granted refuge to Cubans fleeing Castro's repressive rule.

In reliance on this longstanding U.S. policy and action, in the summer of 1994 numerous Cuban refugees fled Castro's regime by sea. App. at 34a, 50a. Commencing around August 19, 1994, without an intervening statute or executive order, Respondents reversed their decades-old policy and began intercepting Cuban refugees and detaining them indefinitely and without legal rights in oppressive conditions on Guantánamo, where ironically previous Cuban refugees had found freedom rather than indefinite detention.[3] App. at 54a. Although Respondents processed the fleeing refugees into so-called "safe-haven" status — implicitly acknowledging their refugee status — they initially offered these refugees only two "options": (1) indefinite confinement at Guantánamo; or (2) repatriation to the country from which they fled and whose human rights violations and Communist dictatorship the U.S. has historically condemned. App. at 35a, 50a-53a, 58a. At the same time, Respondents conceded that forced repatriation of Cuban refugees to the Castro regime was and is unacceptable because, among other reasons, Cuba is a "totalitarian state controlled by President Fidel Castro," has a government that "sharply restricts basic political and civil rights," and is a place where "[h]uman

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[3] For decades, Cuban refugees had achieved freedom by reaching Guantánamo by sea or land, and departing to the United States on scheduled flights from a Freedom House for Cuban refugees that was established there. App. at 54a.

rights activists and dissidents are imprisoned." App. at 60a-61a. Respondents denied the refugees access to their chosen lawyers, and through indefinite detention and one-sided information, implicitly coerced them to return to Castro's Cuba. App. at 36a-37a, 52a-53a.

On October 24, 1994, the Petitioners -- ten detained Cuban refugees [Detainee Petitioners], two U.S. relatives of refugees [Family Sponsor Petitioners], and three Cuban-American refugee service organizations comprised of American lawyers [CRSO Petitioners] — brought an eleven-count class action complaint (Docket No. 94-2183) in the United States District Court for the Southern District of Florida (Atkins, J.), seeking declaratory and injunctive relief. The complaint alleged denials of: (1) the CRSO Petitioners' First Amendment rights; (2) the Detainees' First and Fifth Amendment rights to obtain and associate with retained counsel; (3) the Detainees' right to refugee processing; (4)-(8) the due process rights of minor refugee plaintiffs and pregnant refugee plaintiffs, and to reasonable medical care, freedom from arbitrary discipline and freedom from indefinite detention; (9) the Detainees' right to resist coerced repatriation; (10) the Detainees' right to freedom from the capricious exercise of the Attorney General's statutory parole discretion; and (11) the Detainees' due process right to legitimate expectations of parole. Petitioners simultaneously sought a temporary restraining order on just two of their eleven counts: Counts 1 and 9, regarding the rights of American lawyers to have access to their clients and the rights of the Cuban detainees to resist involuntary repatriation.

Because the District Court never certified the Cuban detainees as a class, the ten Detainee Petitioners are the only refugees involved in the present controversy. Before the District Court, Petitioners made factual showings that the

Cuban detainees were confined in oppressive conditions at Guantánamo, without adequate shelter or medical care, driving many to risk their lives in flight. App. at 50a-52a, 62a-64a. Petitioners further demonstrated that Respondents had discriminated against the American lawyers based on their expressed viewpoint by:

- allowing the American lawyers only restricted, inadequate access to their clients without applying that policy to others;
- granting "selected NGOs" "long-term presence at Guantánamo," while denying that same presence to counsel;
- allowing detainees to ask INS officers, but not their own counsel, about the repatriation process; and,
- disseminating viewpoint-based messages that encouraged refugees to return to Castro through informal contacts, misleading "informational" pamphlets, and military "psychological operations" teams who censored the refugees' news.

App. at 68a-71a, 82a.

On October 31, 1994, the District Court granted the TRO, which addressed the two specific counts raised by the Petitioners. App. at 33a. The TRO allowed the CRSO Petitioners and other American attorneys reasonable and meaningful access to the Cuban refugees detained at Guantánamo, and prevented the coerced repatriation of Cuban refugees. App. at 44a-45a. On November 7, 1994, a Panel of the United States Court of Appeals for the Eleventh Circuit ("Panel") (Kravitch, Birch & Carnes, JJ.) denied Respondents's motion for summary reversal of the

TRO and partially granted Respondents's motion for stay pending expedited appeal. The Panel issued an interim order (1) requiring Respondents to provide the CRSO Petitioners with "reasonable and meaningful access" to the named Detainee Petitioners and other indefinitely detained Cuban refugees who requested counsel in writing and (2) enjoining all repatriations, except of those detainees who expressed in writing a desire to return to Cuba. App. at 65a. In response, Respondents offered the CRSO Petitioners a policy of restricted access, permitting no more than six American attorneys to visit the Cuban Detainees for periods of no more than three days at a time. App. at 72a-73a.

On January 18, 1995, after the parties had briefed only the two counts addressed in the TRO, and the Panel had denied seven *amici curiae* leave to file *amicus* briefs, the Court of Appeals issued a sweeping ruling that Cuban refugees in so-called "safe haven" on Guantánamo "are without legal rights that are cognizable in the courts of the United States." App. at 31a.[4] The Court of Appeals held that by bringing the migrants to safe haven, the government has not created any protectable liberty or property interest against being wrongly repatriated. App. at 23a. Further-

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[4] At the time of this ruling, the Cuban refugees detained at Guantánamo and Panama included: (1) minor children; (2) pregnant women; (3) 94 residents of Guantánamo's "Camp Foxtrot" who had reached Guantánamo *before* the August 1994 Presidential announcement, but then were not allowed to depart on previously scheduled flights to the United States, App. at 54a-55a; (4) refugees interdicted within U.S. territorial waters but taken to Guantánamo, App. at 74a-75a; and (5) an undetermined number of refugees who reached the United States but were removed to Guantánamo. The Panel denied all refugees all rights under U.S. law, but made no specific mention of those in the last three categories, although they clearly fell outside the scope of the Panel's temporal and territorial analysis.

more, ruling on a range of issues that had neither been fully briefed nor argued, the Court of Appeals held that the Immigration and Nationality Act, the Cuban Adjustment Act, the Cuban Democracy Act, the parole statute (8 U.S.C. § 1182), and the Refugee Convention do not apply even to territory under complete United States jurisdiction and control. App. at 22a.

Contrary to its own interim order and an *en banc* ruling of the Eleventh Circuit, the Panel decided that "the First Amendment does not apply to the migrants or to the [American] lawyers at Guantánamo Bay." App. at 29a.[5] The Court of Appeals finally speculated that "the demonstrated concern of groups like the Cuban Legal Organizations ... will hopefully sustain and reassure [the refugees] in their quest for a better life," even though it had just barred those organizations from communicating with the refugees and had now allowed the Government to forcibly return the refugees to Castro's totalitarian dictatorship or to confine them indefinitely in detention camps. App. at 31a.

In the weeks before and after the Panel's decision, Respondents relaxed their policy and began granting special humanitarian parole to various categories of Guantánamo detainees: unaccompanied minors, elderly and infirm detainees, and minors and their families. App. at 58a, 75a.

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[5] The Panel's own November 7th interim order had required Respondents to provide the American lawyers with reasonable and meaningful access to their named plaintiff clients and others who requested representation in writing. App. at 65a. The Eleventh Circuit's *en banc* ruling in *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984) (*en banc*), *aff'd*, 472 U.S. 846 (1985), had further held that alien detainees' American "counsel have a first amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration. . . ."

Pursuant to this policy shift, Respondents paroled all Detainee Petitioners except for Jovani Miguel Fiffe Pino ("Mr. Pino") and Nestor Rodríguez Labori ("Mr. Labori"). On May 2, 1995, in yet another sharp reversal of policy, Respondents announced that they would parole *all* Cubans being held on Guantánamo into the United States, except for a small number who were ineligible for admission because of criminal record, medical, physical or mental condition, or commission of acts of violence while at Guantánamo (exceptions that do not apply to the Detainee Plaintiffs). App. at 77a.[6]

The refugees remaining on Guantánamo are now being systematically paroled into the United States at a rate of several hundred a week. The order of parole for remaining refugees will be determined via lottery. App. at 76a. As of mid-July 1995, only two Detainee Petitioners — Mr. Pulido and Mr. Pino — remain on Guantánamo, awaiting the parole granted by the Government.

ARGUMENT

I. This Court's Decisions In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994) And *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993), As Well As Equitable Factors, Require Vacatur Of The Eleventh Circuit's Erroneous Decision As Moot.

A. Under *U.S. Bancorp* And *Haitian Ctrs. Council*, The Government's Unilateral Decision To Parole In All Cuban Refugees From Guantánamo Renders Moot And Requires Vacatur Of The Decision Below.

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[6] The Respondents also announced that in the future Cuban refugees intercepted at sea would be forcibly repatriated to Cuba rather than taken to Guantánamo. App. at 77a.

Respondents' unilateral May 2nd policy announcement has rendered this case moot. The decision below has been rendered entirely moot with respect to eight of the ten Detainee Petitioners, who have now been paroled into the United States as a result of Respondents' parole policies. The case is effectively moot with regard to the two named Detainee Petitioners who remain on Guantánamo as of this date, awaiting parole: Mr. Labori and Mr. Pino, as well as Elena Pino, Mr. Pino's Family Sponsor. The decision below is also wholly moot as regards the CRSO Petitioners, who no longer require access to Guantánamo now that their detainee clients have been or will soon be released, as well as with respect to Family Sponsor Petitioner Virginia Perez, whose family members have been paroled from Guantánamo into the United States. Unless Respondents choose unduly to delay the departure of these last two Detainee Petitioners, all Cuban petitioners should be in the United States by the time this petition comes before the Court for final disposition.[7]

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[7] Petitioners' case does not fall within the narrow exception to the mootness doctrine for cases that are "capable of repetition yet evading review". As this Court established in *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), actions which are capable of repetition yet evading review must meet the following requirements: (1) the challenged action should be too short in its duration to be fully litigated prior to its cessation or expiration; and, (2) there needs to be a reasonable expectation that the *same* complaining party would be subjected to the *same* action again (emphasis added). The instant case fails to meet both requirements. First, the duration of the Cuban Detainee Petitioners' detention was not so short as to evade review. Here, the Government conceded that the Cuban Detainees could have remained at Guantánamo indefinitely. App. at 58a. Second, the Detainee Petitioners and the Family Sponsor Petitioners will never again be subjected to the same Government action. The CRSO Petitioners will never be subjected to the same form of viewpoint-based discrimination at Guantánamo in their representation of the Detainee Petitioners. In view of the May 2nd forced repatriation

Under Article III of the Constitution, this Court may only adjudicate actual, ongoing controversies. *See Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983); *Honig v. Doe*, 484 U.S. 305, 317 (1988); *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 546 (1976); *Preiser v. Newkirk*, 22 U.S. 395, 401 (1975). A case becomes moot "'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Under the May 2nd policy change, all of the detained Cuban Petitioners have been or will shortly be paroled into the United States. Thus, no live case or controversy exists in which Petitioners have any legally cognizable interest. Because of Respondents' unilateral decision to parole the remaining detainees, the acts which gave rise to the TRO below are no longer at issue. The fact that a live controversy existed when the Petitioners filed suit or when the Court of Appeals rendered judgment, cannot substitute for a live case or controversy over which this Court can now exercise jurisdiction. *Honig*, 484 U.S. at 317; *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10 (1974); *see also Roe v. Wade*, 410 U.S. 113, 125 (1973).

This Court has consistently held that if a prevailing party unilaterally causes the mootness of a pending case, the losing party is entitled to vacatur of the opinion below to protect it from the binding effect of the judgment below. *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950); *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936); *Iron*

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policy, there is no reasonable expectation that any Cuban detainees will be indefinitely detained at Guantánamo in the future. App. at 77a.

Arrow, 464 U.S. at 72. When a case has become moot pending application for a writ of certiorari, this Court has regularly granted the writ, vacated the judgment, and remanded the case to the lower court with instructions to dismiss. *See Alabama v. Davis*, 446 U.S. 903 (1980) (calling vacatur under such circumstances a "duty of the appellate court"); *Munsingwear*, 340 U.S. at 40 (deeming vacatur necessary to clear the path for future relitigation of issues between the parties).

Just two terms ago, in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994), this Court held that "vacatur *must be granted* where mootness results from the unilateral action of the party who prevailed in the lower court." *Id.* at 390 (emphasis added). This Court made clear that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. . . *The same is true when mootness results from unilateral action of the party who prevailed below.*" *Id.* at 391-92 (emphasis added). Applied to this case, *U.S. Bancorp* requires that this Court grant certiorari, vacate the Eleventh Circuit's judgment for mootness under *Munsingwear*, and remand the case to the Eleventh Circuit with instructions to dismiss the judgment.

Vacatur of the Eleventh Circuit's judgment and decision is particularly warranted in light of this Court's parallel disposition of *Haitian Ctrs. Council v. McNary*, ("*McNary II*") 969 F.2d 1326 (2d Cir. 1992), *vacated as moot on other grounds sub nom., Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993). In *McNary II*, the Second Circuit had affirmed a preliminary injunction requiring that American lawyers be given access to Haitian clients being indefinitely

detained on Guantánamo. In petitioning this Court to review that judgment, the Solicitor General argued:

> [I]f the Second Circuit's affirmance of the preliminary injunction at issue here should later become moot prior to the Court's disposition of the petition for certiorari, *the proper course would be to vacate the decision of the Second Circuit, not to deny the petition. See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Reply Brief for the Petitioners at 10, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) (No. 92-528) (emphasis added). App. at 79a.

While the Solicitor General's petition for certiorari was pending, the District Court ordered the detained Haitian plaintiffs released. The Government chose to parole all of the Guantánamo Haitians, and to bring them into the United States. The Solicitor General again argued to this Court:

> We agree that the preliminary injunction now is moot. As we stated in our reply brief (at 10), however, *the proper disposition in the event of mootness is not to deny the petition, but rather to grant the petition and vacate the judgment of the court of appeals as moot. See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *University of Texas v. Camenisch*, 451 U.S. 390 (1981).

Supplemental Brief for the Petitioners at 3, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) (No. 92-528) (emphasis added). App. at 80a. Accordingly, this Court granted the petition, and vacated and remanded the court of appeals' judgment, citing only those authorities cited in the

Solicitor General's Supplemental Brief. *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028, 3028 (1993).

Fairly applied, this Court's precedents in *U.S. Bancorp* and *Haitian Ctrs. Council* dictate the disposition of the instant petition. As in *U.S. Bancorp*, mootness here has resulted from the unilateral decision of the prevailing party below. As in *McNary II*, the Department of Justice's decision to release the Detainee Petitioners from indefinite detention on Guantánamo has rendered the dispute moot, and requires this Court to grant the petition for certiorari, vacate, and remand with instructions to dismiss the judgment below.

B. Equitable Factors Require Vacatur Of The Eleventh Circuit's Erroneous Decision, Which Misapplied Controlling Circuit And Supreme Court Precedent By Wholly Disregarding American Lawyers' First Amendment Rights And By Denying The Cuban Refugee Plaintiffs All Rights Under U.S. Law

Although Article III prevents the Court from considering the merits of a judgment that has become moot while awaiting review, the Court may nevertheless make disposition of the whole case as justice may require. *U.S. Bancorp Mortgage Company*, 115 S. Ct. at 389-90 (citing *Walling v. Reuter Co.*, 321 U.S. 671, 677 (1944)). "From the beginning we have disposed of moot cases in the manner 'most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot." *Id.* at 391 (quoting *Hamburg-Amerikanische Packet Co. v. United States*, 239 U.S. 466, 477-478 (1916)). Thus, "[i]t is a familiar practice of this Court that where for any reason the Court may not properly proceed with a case brought to it on appeal, or where for any reason it is without power to proceed with an appeal, it may nevertheless, in an exercise of its supervisory appellate power, make such

disposition of the case *as justice requires*. When events subsequent to an appeal may affect the correctness of the judgment appealed from, this Court may vacate the judgment and remand the cause for further proceedings." *Walling*, 321 U.S. at 676 (emphasis added).

Three equitable factors compel the remedy of vacatur in this case. First, it would be grossly unfair to leave the Eleventh Circuit's decision undisturbed when, in a similar procedural posture, this Court vacated and remanded the Second Circuit's decision in *McNary II*, 996 F.2d at 1326, a ruling contrary to the Eleventh Circuit's decision below on nearly identical facts. Second, the Court of Appeals wholly disregarded controlling precedent regarding the First Amendment rights of American lawyers, and issued a ruling flatly inconsistent with this Court's recent decision in *Florida v. Went for It, Inc.*, 63 U.S.L.W. 4644, 1995 WL 365648 (U.S. June 21, 1995) (No. 94-226), which issued after the Eleventh Circuit's decision in this case. Third, the Court of Appeals here issued a broad, erroneous ruling, without full briefing, by denying Cuban plaintiffs all rights under U.S. law. That ruling extended far beyond the issues necessary to the resolution of the appeal and egregiously misapplied this Court's controlling precedents.

1. *Judicial Even-Handedness Requires Vacatur In This Case*

In fairness, the Government should not be entitled to have its appeal spawn unreviewed legal consequences after this case has been mooted on its way to this Court, as a result of the Government's unilateral acts. Equity mandates that the Petitioners should be protected from the binding effect of the Court of Appeals' opinion. *See Walling*, 321 U.S. at 676-77; *U.S. Bancorp*, 115 S. Ct. at 391 (explaining the appropriateness of "remanding a moot case for dismissal

because 'the ends of justice exact that [a] judgment below should not be permitted to stand when without any fault of the [petitioner] there is no power to review it upon the merits.'") (quoting *Hamburg-Amerikanische Packet Co.*, 239 U.S. at 478). In *Munsingwear*, this Court explained that the purpose of vacatur was to protect the losing party from the collateral effects of a judgment that it might have been able to overturn but for the mooting event. *Munsingwear*, 340 U.S. at 40-41; *see also JT School Distr. 241 v. Harris*, 1995 U.S. Lexis *4292 (June 26, 1995) (vacating judgment as moot). In *U.S. Bancorp*, this Court recently emphasized that "a party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Id.* at 391-92.

Equitable considerations particularly mandate vacatur in cases such as this, where defendants are U.S. Government officials, with broad, unilateral power to moot suits brought against them via policy decisions implemented through Executive announcement, without Congressional approval. If this Court does not vacate the decision below, the Government will have advantageous precedent to rely upon, should it elect to engage in similar conduct in the future.

On the other hand, when lower courts have issued precedents *adverse* to Respondents — as the Second Circuit did earlier regarding the rights of American lawyers and detained refugees held on Guantánamo — Respondents have invariably insisted that the remedy of vacatur be invoked to moot and eliminate these adverse precedents. In the *Haitian Ctrs. Council* litigation, for example, the United States District Court of the Eastern District of New York issued, and the Second Circuit affirmed, a preliminary injunction restricting U.S. government officials from repatriating certain

Haitian detainees on Guantánamo who had not had an opportunity to consult with counsel. *Haitian Ctrs. Council v. McNary* ("*McNary I*"), 789 F. Supp. 541 (E.D.N.Y. 1992), *aff'd*, 969 F.2d 1326 (2d Cir. 1992). The District Court issued a permanent injunction ordering the immediate release of the Guantánamo Haitians, holding that aliens incarcerated on Guantánamo have Fifth Amendment Due Process Rights; that defendant government officials had violated those rights by denying them immigration procedures showing deliberate indifference to their medical needs, and subjecting them to informal disciplinary procedures and indefinite detention; that U.S. government officials had violated the American lawyers' First Amendment rights by denying them access to the Haitians for purpose of counselling, advocacy, and representation; and that the defendants had abused their statutory authority under the Administrative Procedure Act by conducting unauthorized asylum interviews on Guantánamo and denying parole to the screened-in Haitians. *Haitian Ctrs. Council, Inc. v. Sale* ("*Sale I*"), 823 F. Supp. 1028, 1041 (E.D.N.Y. 1993). The Government responded by "unilaterally" releasing the Guantánamo Haitians, then asking this Court to vacate the Second Circuit precedent as moot, and agreeing (prior to this Court's decision in *U.S. Bancorp*) to vacate the District Court's permanent injunction decision by settlement. *Haitian Ctrs. Council*, 113 S. Ct. at 3028. Thus, throughout the Haitian refugee litigation, the Government exploited its unique position as a litigant and policymaker to invoke the *Munsingwear* doctrine to avoid the adverse precedential effect of lower court decisions. It would be extremely unfair for this Court now to hold that what was sauce for the goose is not sauce for the gander.

2. *The Panel's First Amendment Ruling Violated Controlling Precedents Of This And Other Courts*

A second factor strongly favoring vacatur is that on its face, the Court of Appeals' decision disregarded this Court's controlling precedents regarding the First Amendment rights of American lawyers. The Panel broadly declared that "the First Amendment does not apply to the migrants or to the [American] lawyers at Guantánamo Bay . . .," App. at 29a. Read literally, this overbroad statement would permit the Government to bar American citizens on Guantánamo not just from speaking to their Cuban clients, but also from speaking to other Americans there, and would free U.S. officials to punish Americans on Guantánamo for writing open letters, criticizing the President, or even for engaging in religious worship.[8]

The Court of Appeals even refused to consider Petitioners' First Amendment claim of impermissible viewpoint-based discrimination.[9] App. at 28a-29a. Consequently, the Court of Appeals permitted the Government to engage in intentional viewpoint-based

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[8] These are not simply hypothetical horribles. In March 1995, for example, U.S. authorities on Guantánamo apparently excluded paintings by Cuban refugees from a Guantánamo art show because they were critical of U.S. policy. Pamela S. Falk, *Trapped in Cuba*, N.Y. TIMES, April 15, 1995, at 19.

[9] Before the District Court, Petitioners demonstrated that even while Respondents had restricted American lawyers' access to their refugee clients, they had permitted many other individuals access to Guantánamo to speak with the Cuban Detainees and to express their viewpoint, including even legal opinions: *e.g.*, national press correspondents, Miami-based media correspondents, Amnesty International, a renowned baseball player, and other U.S. civilians. App. at 69a, 82a, 83a.

discrimination against U.S. lawyers, so long as it happened on Guantánamo. The Panel's ruling simply ignored this Court's repeated directive that, the Government may not discriminate against speech in order to suppress a disfavored viewpoint. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141, 2147-48 (1993) ("'[T]he First Amendment forbids the Government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983) (Government may not "suppress expression merely because public officials oppose the speaker's view."). This absolute First Amendment proscription does not fade away simply because the Government obstructs rights on a military base, *Flower v. United States*, 407 U.S. 197, 198-99 (1972) (Government cannot abridge First Amendment rights of civilians on military base to which public has access), or outside United States territory. *Cf. Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (First Amendment's religion clause applies extraterritorially).

Indeed, on nearly identical facts, in the *Sale I* case, the U.S. District Court for the Eastern District of New York permanently enjoined the Government from barring U.S. lawyers from communicating with Haitians held indefinitely on Guantánamo, ruling that the defendants there had engaged in unlawful viewpoint discrimination by permitting "[t]he legal rights and options of ... detainees [to be] discussed on Guantánamo, but only from the viewpoint of which the Government approves." *Sale I*, 823 F. Supp. at 1040. The Court of Appeals' acceptance of viewpoint-based discrimination in a nonpublic forum equally violates this Court's rulings in *Perry*, 460 U.S. at 46, and *Lamb's*

Chapel, 113 S. Ct. at 2147-48, thus warranting the remedy of vacatur.

Moreover, vacatur is warranted because the Panel blatantly departed from the accepted course of judicial proceedings by ignoring its opinion in *Jean*, 727 F.2d at 981-82. In *Jean*, as here, alien detainees challenged the legality and conditions of their confinement, charging that the Government had "placed extensive restrictions on contacts between outsiders and the ... detainees, thereby frustrating the efforts of ... attorneys to inform them of their legal rights." *Jean*, 727 F.2d at 983. The *en banc* Eleventh Circuit held that the detainees' American "counsel have a first amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration...." *Id.* at 983. This Court affirmed *Jean* on other grounds without disturbing its First Amendment ruling. 472 U.S. at 846. Thus, the *en banc* ruling in *Jean* should have controlled the disposition below.

Without following, distinguishing, or even mentioning its own Circuit's *en banc* precedent, the Panel instead held that American attorneys have no independent First Amendment right to counsel their clients unless "the Cuban ... migrants have any of the statutory or constitutional rights ... that might sustain the attorneys' claims to [a First Amendment] right of association." App. at 29a. In fact, the *Jean* Court's *en banc* decision had held just the opposite.[10]

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[10] In *Jean*, the Court expressly did *not* predicate the attorneys' First Amendment rights "upon the existence of an underlying legal claim that may be asserted by the potential litigant." *Jean*, 727 F.2d at 983. *Accord Sale I*, 823 F. Supp. at 1041 ("First Amendment rights of the Haitian Service Organizations are not contingent upon independent right of the Haitian detainees.") *Jean* held that American counsel had a valid

By flouting its own circuit precedent, the Panel violated not only internal Eleventh Circuit law,[11] but also this Court's precedents. Upon reflection, it makes no constitutional sense for a court to demand that a *client* have an underlying legal claim before the First Amendment applies to his *lawyer's* speech. Had this standard applied prior to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), the NAACP would have had no First Amendment right to engage in the very litigation that later led to judicial recognition of its members' equal protection rights.[12]

Just last Term, in *Florida v. Went for It, Inc.*, this Court unanimously reaffirmed that the political (as opposed to commercial) speech of attorneys merits full First Amendment protection. *Went for It, Inc.*, 63 U.S.L.W. 4645, 1995 WL 365648, *1, 3 (U.S. June 21, 1995) (No. 94-226). Although the Court upheld the specific regulation of commercial speech at issue there, Justice O'Connor carefully specified for the Court that "[t]here are circumstances in which we

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and *independent* First Amendment right to counsel those detainees. *Id.* at 984.

[11] Rather than following the controlling *en banc* precedent of the Circuit, the Panel purported to rely upon inapposite dicta in a 2-1 Panel opinion in *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992). App. at 21a. Yet to the extent that *Jean* and *Baker* were in tension, Eleventh Circuit law squarely mandated that *Jean*, a case cited by the Panel, should have controlled. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[12] For this very reason, this Court has repeatedly held that "'litigation is . . . 'a form of political expression' and 'political association'" that should not be limited on the grounds that it has not yet succeeded in establishing rights. *In re Primus*, 436 U.S. 412, 428 (1978) (quoting *NAACP v. Button*, 371 U.S. 415, 429, 431 (1963)).

will accord speech by attorneys on public issues and *matters of legal representation the strongest protection our Constitution has to offer.*" *Id.* at *10 (citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *In re Primus*, 436 U.S. at 412. Similarly, the dissenting Justices found it settled law that "[a]ttorneys who communicate their willingness to assist potential clients are engaged in speech protected by the First and Fourteenth Amendments," *id.* at *11 (dissent of Justice Kennedy, joined by Justices Stevens, Souter, and Ginsburg) and argued for a "general rule . . . that the speaker [here the American lawyers] and the audience [the Cuban clients], not the government, assess the value of the information presented." *Id.* at *16, quoting *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993).

Given the Panel's blatant disregard of the First Amendment precedent underlying *Went For It, Inc.*, vacatur would be warranted here, if only to require the Panel to consider and apply the governing First Amendment precedent.

3. *The Panel's Ruling Denying All Legal Rights To Cuban Detainees Violated Controlling Precedents Of This And Other Courts*

A third and final factor compelling vacatur is that the Panel issued a startling and sweeping ruling simply asserting that Cuban and Haitian refugees on Guantánamo and Panama "are without legal rights that are cognizable in the courts of the United States." App. at 31a. Read literally, this language would theoretically free American officials deliberately to terrorize those refugees, to starve them, to subject them to forced abortions and sterilizations, and to discriminate against them based on the color of their skin. It would follow *a fortiori* that U.S. officials could apprehend innocent refugees inside and outside U.S. territorial waters

and confine them forever, without legal rights and without any asylum or parole processing, in punitive offshore detention camps under exclusive U.S. jurisdiction and control.[13] Notwithstanding the Declaration of Independence, the U.S. Government could cite the Panel's language to deny innocent individuals their inalienable rights to life, liberty and property without any process whatever, even though they were subject to indefinite U.S. custody, on territory subject to exclusive U.S. jurisdiction and control.

So read, the Panel's opinion would permit the Government to purposefully deny innocent refugees any rights under U.S. law by the mere artifice of holding them "outside the United States" on U.S.-controlled territory.[14] *But see Baker*, 953 F.2d at 1516 (Hatchett, J., dissenting). Aliens, even those considered "excludable," have long had at least limited constitutional rights when detained by the Government on U.S.-controlled territory. *See, e.g., Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950) (illegal alien entitled to due process in deportation hearing); *McNary*

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[13] Left undisturbed, the Panel's ruling on this point would undermine Justice Jackson's prescient statement in *Shaughnessy v. United States (Mezei)*: "Fortunately it is still startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial." 345 U.S. 206, 218 (1953) (Jackson, J., dissenting).

[14] In deciding that innocent refugees have no constitutional rights at Guantánamo, the Panel also relied on miscitations to this Court's decisions involving *criminal* or enemy aliens not present in U.S.-controlled territory. App. at 27a (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (Fourth Amendment did not apply to search of accused narcotics offender's home in Mexico); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (Fifth Amendment did not protect hostile German war criminals tried in China by U.S. Army)).

II, 969 F.2d at 1343 (Constitution limits conduct of U.S. personnel as to aliens detained on Guantánamo, a land mass exclusively controlled by U.S.), *vacated as moot sub nom.*, *Haitian Ctrs. Council*, 113 S. Ct. 3028 (1993); *Sale I*, 823 F. Supp. at 1041 (E.D.N.Y. 1993) (constitutional rights applied to non-citizens outside U.S. who encounter official U.S. action) (vacated by settlement). Left alone, the Panel's overbroad ruling would effectively render Guantánamo — territory over which the U.S. exercises exclusive jurisdiction and control — a "rights-free" zone, in which U.S. officials exercise limitless power over refugees, free from any constraint imposed by U.S. law.

In so ruling, the Panel also dismissed numerous statutory, treaty-based, and constitutional claims that were not properly before it on appeal.[15] With respect to the legal status of Guantánamo, the Panel even conceded that its analysis conflicted with decisions of two other courts in the Second Circuit that analyzed the same question on nearly identical facts[16], acknowledging the sharp split between the circuits

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[15] The Panel erroneously reasoned that these issues were decided in *Baker*, 953 F.2d at 1498, and *Sale v. Haitian Ctrs. Council, Inc.* (*"Sale II"*), 113 S. Ct. 2549 (1993). Yet those decisions in no way addressed the rights of *indefinitely detained Cuban refugees being held at Guantánamo*. Moreover, the Court of Appeals misconstrued the *Sale II* decision as somehow holding that INA § 243(h) and Article 33 of the 1951 Convention do not apply in Guantánamo or the Panama Canal Zone. App. at 22a. Yet in *Sale II*, this Court clearly held only "that neither [of those provisions] applies to action taken by the *Coast Guard on the high seas*," 113 S. Ct. at 2552 (emphasis added), saying nothing about actions taken by other Government officials on territory (like Guantánamo) that is subject to complete U.S. jurisdiction and control.

[16] App. at 23a (citing *Sale I*, 823 F. Supp. at 1028 and *McNary II*, 969 F. 2d at 1326).

engendered by its decision. Finally, the Court of Appeals plainly erred by claiming that "providing safe haven residency [to Cuban and Haitian refugees] is a gratuitous humanitarian act which does not in any way create even [a] putative liberty interest" protected by the Due Process clause. App. at 23a. For if long-term detainees may not work in the American "safe haven" camps, may not apply for political asylum, may not leave (except to return to the very place they fled), and may be forcibly repatriated at the whim of the U.S. Government, those camps effectively offer no safe haven at all. By "processing-in" the detained refugees to "safe haven" status, Respondents implicitly acknowledged their right to assert refugee status, which Respondents could not then take away without any semblance of process whatever. Without deciding what "safe haven" means or signifies, the Court of Appeals wrongly decided that defendants may grant the Cuban refugees "safe haven" status, terminate that status at will, and deny the refugees all due process, advice of counsel, or even accurate information before returning them to conditions of grave danger in Castro's Cuba.

At a minimum, rulings of such sweep and magnitude should have been fully briefed and argued, based on a complete District Court record. Instead, the Panel announced its overbroad dicta, and on an expedited interlocutory appeal in which the only two narrow issues before the Panel were the American lawyers' First Amendment rights and the refugees' right to resist coerced repatriation. Given the important public and national interests at stake, the acknowledged split between the decision below and prior decisions of courts within the Second Circuit, the Panel's erroneous rulings on important questions of federal law resolved by this Court, and the Panel's departure from the accepted and usual course of

judicial proceedings within its own Circuit, Petitioners have more than established their equitable entitlement to the remedy of vacatur. This Court should therefore exercise its broad supervisory power over the judgments of a lower federal court, granted in 28 U.S.C. § 2106, as it has been "commonly utilized in precisely this situation[,] to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the Eleventh Circuit's opinion and order of January 18, 1995 and judgment of April 27, 1995 should be vacated as moot under *U.S. v. Munsingwear*, 340 U.S. 36, 39-41 (1950), and the case remanded to the Eleventh Circuit with instructions to dismiss the judgment.

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Appendix A

IN THE
UNITED STATES COURT OF APPEALS,
FOR THE ELEVENTH CIRCUIT

CUBAN AMERICAN BAR ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors-Appellees,

v.

WARREN CHRISTOPHER, Secretary of State, et al.,
Defendants-Appellants.

Nos. 94-5138, 94-5231 and 94-5234.

Jan. 18, 1995.

Before KRAVITCH, BIRCH and CARNES, Circuit Judges.

BIRCH, Circuit Judge:

This case requires us to address the following issues: (1) whether Cuban and Haitian migrants temporarily provided safe haven at the United States naval base at Guantanamo Bay, Cuba, and at the United States military installations in Panama, may assert rights under the Immigration and Nationality Act, the 1951 United Nations Convention Relating to the Status of Refugees, the Cuban Adjustment Act, the Cuban Democracy Act and the Constitution of the United States; (2) whether legal organizations

can sustain First Amendment claims of freedom of speech and association with these migrants; and (3) whether the First Amendment or the Equal Protection clause of the Fifth Amendment dictates that the United States government must furnish a list of Haitian migrants who are residing at Guantanamo Bay to the Haitian Refugee Center, a legal service organization. The district court has entered preliminary injunctions granting attorneys for the Cuban migrants access to all Cuban migrants provided safe haven prior to voluntary repatriation and attorneys for Haitian migrants access to their clients and any other Haitian migrants who request counsel in writing, barring the government from repatriating any Cuban migrants prior to the migrant's consultation with a lawyer, directing the United States Attorney General to parole unaccompanied minor Haitian migrants into the United States on the same terms that unaccompanied minor Cuban migrants have been or may be paroled, and requiring the government to release the names of all Haitian migrants to the Haitian Refugee Center. After thorough review of authority in this circuit and the Supreme Court, we VACATE the district court's order and REMAND to the district court with direction to dismiss the plaintiffs' claims.

I. BACKGROUND

A. Factual Background

1. *Cuban Migration*

On August 8, 1994, Fidel Castro announced that the Cuban government would no longer forcibly prevent emigration from Cuba by boat. Castro's new policy encouraged thousands of Cubans to board makeshift rafts and boats to escape Cuba and head for the shores of the United States. While many were lost at sea, approximately 8000 Cubans arrived in the United States safely.

In an effort to quell this influx of migrants and to save the rafters' lives, on August 19, 1994, the President of the United States ordered the United States Coast Guard to intercept watercraft carrying persons fleeing from Cuba and bound for the United States' border and to transport these persons to the American naval base at Guantanamo Bay, Cuba. The United States leases its military base at Guantanamo Bay from sovereign Cuba under a lease agreement negotiated in 1903.[1]

In August, 1994, the United States government began negotiating with the Cuban government to halt the flow of migrants to the United States. These diplomatic negotiations culminated on September 9, 1994, in an accord with the Cuban government. In this accord, the United States agreed it would allow Cuban migrants to enter the United States only by applying for immigrant visas or refugee admittance at the United States Interests Section in Havana, Cuba. A minimum of 20,000 persons are to be allowed to migrate legally to the United States each year, not including immediate relatives of United States citizens who are under no numerical restrictions. However, in conjunction with this international agreement, the Attorney General also ordered that no

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[1] The Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418, *reprinted in*, 6 Bevans 1113-15 [hereinafter Lease Agreement], provides that the United States has "control and jurisdiction" over the leased land, but that Cuba retains sovereignty over the land. The lease states in pertinent part:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased] areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas....

Lease Agreement, art. III.

Cuban who had accepted safe haven in Guantanamo Bay or Panama would be allowed to apply for a visa or for asylum in the United States from safe haven.[2]

Currently, Cuban migrants have three options with respect to their residence: (1) they may remain in safe haven; (2) they may repatriate to sovereign Cuba voluntarily; or (3) they may travel to a third country willing to accept them. While more than 1000 Cubans have requested voluntarily to be returned to Cuba, the Cuban government has restricted the return of Cuban nationals and has delayed the voluntary repatriation process. Persons who repatriate to Cuba voluntarily may then apply for asylum through the regular channels commencing at the United States Special Interests Section in Havana, Cuba.

The United States government's expressed desire is not to maintain these migrants for an indefinite period of time or against their will. The government's position is that it could return the migrants to Cuba legally without a migrant's request. However, the government has offered the Cuban migrants safe haven for as long as the migrants wished. All Cuban migrants volunteering to repatriate execute a form approved by the United Nations High Commissioner for Refugees ("UNHCR") and meet with a representative from UNHCR before returning.

UNHCR is an agency of the United Nations specializing in the care and well-being of refugees worldwide. UNHCR was established by the United Nations general assembly on January 1, 1951, "to provide international protection to refugees and to seek

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[2] According to Michael Skol, Principal Deputy Assistant Secretary of State for Inter-American Affairs at the Department of State, this policy was implemented "to deter further dangerous migration from Cuba, and to provide Cubans seeking entry into the United States a safe alternative to boat departures...." Skol Decl. ¶ 9.

permanent solutions for their problems." *UNHCR, Handbook for Emergencies* § 2.2(1) (1982). The UNHCR "aim[s] ... to secure treatment in accordance with universally recognized humanitarian principles not directly linked to the status [as refugees] of those in need." *Id.* § 2.1(4); *see also id.* § 2.2(1). UNHCR has participated with the United States government in ensuring that any return to Cuba was made on a voluntary basis.

In addition to UNHCR, humanitarian groups such as Amnesty International, Inc., the U.S. Committee for Refugees, and Church World Service (Immigration and Refugee Service) as well as legal organizations such as the Ad Hoc group of Cuban-American Attorneys, have been allowed to visit the migrants at the base. However, as the numbers of migrants and the length of the stay in safe haven have increased, problems have erupted. Many Cuban migrants have climbed over barbed wire and jumped from treacherous cliffs into the bay in attempts to swim the mile or so back to sovereign Cuba. Still others have scaled fences and braved a mine field in order to reach their homeland. During early December, 1994, many were injured during riots at the camps, particularly in Panama. The risk of violence and danger, both to the migrants and to the military personnel charged with their care, has grown. While the United States has begun negotiating with other countries to accept migrants from safe haven and has continued with the voluntary repatriation program, problems continue.

Since consummation of the accord, the Attorney General has exercised her discretion to parole into the United States Cuban migrants who have sponsors in the United States and are (1) over the age of 70; (2) who are ill; or (3) who are unaccompanied minors (under the age of 13). She has also begun to consider, on a case-by-case basis, the possible parole of other Cuban children at Guantanamo Bay who are accompanied, but who may suffer

severe hardship if they remain in safe haven. Over 20,000 Cubans currently remain in safe haven at Guantanamo Bay[3] and at military installations in Panama.

2. *Haitian Migration*

In 1991, Haiti's elected leader, Jean-Bertrand Aristide, was ousted from power. As a result, thousands of Haitians departed Haiti and attempted to reach the United States. Between May, 1992, and June, 1994, the United States Coast Guard interdicted on the high seas Haitians bound for the United States and returned them directly to Haiti. In June, 1994, the government began processing some migrants for asylum in the United States. However, in July, 1994, the United States began offering safe haven at Guantanamo Bay to the migrant Haitians; the government was not allowing the Haitian migrants to enter the United States, but was not returning them directly to Haiti. At the peak of emigration in 1994, over 16,800 Haitian migrants were housed at Guantanamo Bay.[4]

On September 19, 1994, the United States led a United Nations-authorized military intervention in Haiti. Through these efforts, Haitian President Jean-Bertrand Aristide was returned to power on October 15, 1994. After his reinstallation an ever-increasing number of Haitians in safe haven have volunteered to

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[3] The base at Guantanamo Bay is divided up into various camps housing families, single men, single women and unaccompanied children. There are two special camps, Camps November I and II, where migrants who have voluntarily requested to be repatriated are housed for their safety.

[4] Haitian migrants are being housed only at Guantanamo Bay; no Haitians are in safe haven in Panama. The camp divisions are similar to those maintained for Cuban migrants; however, there are no special camps for those migrants who have requested repatriation.

repatriate. Approximately 8000 Haitians remained at Guantanamo Bay on December 19, 1994.

B. Procedural Background

1. *The Cuban Migrants' Case*

On October 23, 1994, plaintiffs-appellees, Cuban American Bar Association, Inc., Cuban Legal Alliance, Inc., and Due Process, Inc. (collectively "Cuban Legal Organizations"), some Cuban individuals being held on Guantanamo Bay, and some individuals with family members being held on Guantanamo Bay (collectively "individual Cuban plaintiffs") filed a class action complaint requesting declaratory and injunctive relief under, *inter alia*, the First and Fifth Amendments, 8 U.S.C. § 1253(h), 8 U.S.C. § 1158(a), and Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, [hereinafter the Refugee Convention][5]. Specifically, the Cuban Legal Organizations and the individual Cuban plaintiffs requested that the district court enter an injunction preventing the defendants-appellants ("the government") from denying the Cuban Legal Organizations reasonable access to and communication with their Guantanamo Bay clients for legal consultation relative to the Cuban migrants' putative rights regarding asylum petitions and parole decisions. The Cuban Legal Organizations and the individual Cuban plaintiffs also sought an injunction prohibiting the government from "encouraging or coercing, directly or indirectly,

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[5] The United States acceded to the United Nation Protocol Relating to the status of Refugees on November 6, 1968. The Protocol bound the United States to comply with Articles 2 through 34 of the Refugee Convention. Protocol Relating to the Status of Refugees, *opened for accession*, Jan. 31, 1967, art. I, § 1, 19 U.S.T. 6223. The United Status agreed to the Protocol with the following reservation, "[a]s to any such provision, the United States will accord to refugees lawfully staying in its territory treatment no less favorable than is accorded aliens generally in the same circumstances." 19 U.S.T. at 6257.

the repatriation to Cuba of, and repatriating, any [Cuban migrant] currently being detained by the United States Government." Class Action Compl. at 59, *Cuban Am. Bar Ass'n v. Christopher*, No. 94-2183 (S.D. Fla. Oct. 24, 1994) [hereinafter *CABA I*].

On October 25, 1994, upon learning that at 11:30 a.m. that day the government would return to Cuba, by plane, twenty-three Cuban migrants who had previously volunteered for repatriation, the Cuban Legal Organizations and the individual Cuban plaintiffs filed an emergency motion for a temporary restraining order and request for an emergency hearing to block the repatriation. Approximately one minute before the plane was to take off, the district court verbally ordered the government to halt the repatriation of these migrants.

The district court further considered the arguments of the parties, and on October 31, 1994, the court granted the Cuban Legal Organizations' and the individual Cuban plaintiffs' motion for an emergency "temporary restraining order." Order Granting Plaintiffs' Emergency Mot. for T.R.O., *CABA I*, (Oct. 31, 1994) [hereinafter October 31 Order]. The district court specifically granted the Cuban Legal Organizations and the individual Cuban plaintiffs the following relief:

> (a) [The government] shall refrain from denying [Cuban Legal Organizations] and other counsel reasonable and meaningful access to the [Cuban migrants in safe haven]; and
>
> (b) [The government] shall refrain from repatriating *any* [Cuban migrants in safe haven], including those twenty-three (23) persons who were the subject of the temporary restraining Order entered October 25, 1994, without permitting them access to counsel and receipt of full information so as to assure an informed and voluntary decision to seek repatriation.

Id. at 13 (emphasis added). The October 31 Order was put into effect "until further order of the court." *Id.*

On November 1, 1994, the government filed a notice of appeal and a motion requesting the district court to stay its own order. The district court failed to grant this request and the government, on November 2, 1994, pursuant to 28 U.S.C. § 1292(a)(1), filed a motion for summary reversal, or in the alternative, for an emergency stay pending appeal in this court. On November 3, 1994, we granted that request in part, staying that portion of the district court's October 31 Order which prevented repatriation of Cuban migrants who had requested in writing to be returned. *Cuban Am. Bar Ass'n v. Christopher*, No. 94-5138 (11th Cir. Nov. 3, 1994) [hereinafter *CABA II*] [hereinafter November 3 Order]. On November 4, 1994, we heard oral argument on an expedited basis and that day modified our November 3 Order verbally. We entered a written order on November 7, 1994, confirming our verbal order. *CABA II*, (Nov. 7, 1994) [hereinafter November 7 Order]. We granted the government's motion in part and denied it in part. Specifically, we instructed the government to allow the Cuban Legal Organizations reasonable access to their clients and to any other Cuban migrants who, in writing, requested legal counsel. We also stayed that portion of the district court's order that prevented the government from arranging repatriation of Cuban migrants in Camp November, who "expressed a desire by written declaration to be returned to sovereign Cuba"; however, we barred the government from repatriating any Cuban migrant who did not "express, by written declaration, a desire to be returned to sovereign Cuba." November 7 Order at 2. After our November 7 Order but prior to oral argument over 241 Cubans were repatriated.

2. *The Haitian Migrant's Case*

On October 31, 1994, the Haitian Refugee Center ("HRC") and some individual Haitian migrants at Guantanamo Bay filed a motion to intervene and a motion for temporary restraining order. HRC requested a temporary restraining order instructing the government to afford HRC access to all Haitian migrants at Guantanamo Bay, barring the government from denying parole to unaccompanied Haitian minors, and ordering the disclosure of the identities of all Haitian migrants in safe haven.

The district court issued two orders granting in part the relief HRC requested in its original motion for a temporary restraining order.[6] The district court issued its preliminary order on November 22, 1994, granting HRC access to named plaintiffs and any other Haitian migrants who requested counsel in writing, ordering the Attorney General to parole from safe haven unaccompanied Haitian minors in the same manner as unaccompanied Cuban minors, and directing the government to release the names of all Haitian migrants to HRC. Order on

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[6] Prior to the district court's ruling on the original motion for a temporary restraining order, on November 1, 1994, the district court heard an oral motion by HRC for a temporary restraining order blocking the government from repatriating 14 Haitians at Guantanamo Bay who were scheduled for imminent repatriation. The government agreed to delay repatriation until November 3, 1994. the government was planning to repatriate a total of 54 Haitians; 40 of those were returning to seek medical attention and the remaining 14 were the subject of the district court's order. The day after oral argument, November 2, 1994, the district court provisionally granted the HRC's motion to intervene and entered a temporary restraining order preventing the government's scheduled repatriation of the fourteen Haitians. Corrected Order on Mot. to Intervene and Mot. for T.R.O., *CABA I* (Nov. 2, 1994).

HRC then requested that the district court bar the government from repatriating Haitians who were scheduled to return to Haiti on November 20, 1994. On November 18, the district court ordered that repatriation could occur as planned under the condition that all Haitians repatriated had requested repatriation in writing. Order on Haitian Refugee Ctr.'s Emergency Mot. for T.R.O. and Request for Emergency Hr'g, *CABA I* (Nov. 18, 1994). That repatriation took place as scheduled.

Provisional Intervenors' Mot. for T.R.O., *CABA I* (Nov. 22, 1994) [hereinafter November 22 Order]. Upon the government's motion, the district court granted a stay of the November 22 Order as it applied to parole of the minor Haitians and the release of the names of migrants, but continued in force the order allowing HRC access to detained Haitians who requested legal counsel. Omnibus Order, *CABA I* (Nov. 28, 1994) [hereinafter November 28 Order].

Appeals from these orders were filed and on December 1, 1994, the cases filed by the Cuban Legal Organizations and the individual Cuban plaintiffs (No. 94-5138) and HRC and the individual Haitian migrants (Nos. 94-5231 and 94-5234) were consolidated for consideration by this court. On December 19, 1994, after oral argument on the issues presented, we dissolved our November 7 Order and stayed all the relief granted by the district court in its October 31 Order, November 22 Order and November 28 Order. Furthermore, by our December 19 Order, we stayed all further proceedings in the district court, including discovery.

3. *Issues on Appeal*

We now consider the following issues on appeal:

1. Whether the Cuban or Haitian migrants in safe haven outside the physical borders of the United States have any cognizable statutory or constitutional rights.

2. Whether the Cuban Legal Organizations or HRC have a First Amendment right to associate with migrants held in safe haven outside the physical borders of the United States for the purpose of engaging in political speech, and if so, whether the government engages in impermissible viewpoint discrimination violative of any First Amendment rights of the individual migrants or the Cuban Legal Organizations or

HRC by restricting the legal organizations' access to the migrants for the purposes of legal consultation.

3. Whether the government must disclose to HRC the names of all Haitian migrants in safe haven.

II. DISCUSSION

A. Jurisdiction

1. *Appealability of Temporary Restraining Orders*

While temporary restraining orders are not generally subject to appellate review, *Haitian Refugee Ctr., Inc. v. Baker*, 950 F.2d 685, 686 (11th Cir.1991) [hereinafter "*HRC I*"]; *McDougald v. Jenson*, 786 F.2d 1465, 1472 (11th Cir.), *cert. denied*, 479 U.S. 860, 107 S.Ct. 207, 93 L.Ed.2d 137 (1986), "where the order has the effect of a preliminary injunction this court has jurisdiction to review the order and is not bound by the district court's designation of the order." *HRC I*, 950 F.2d at 686. To determine whether an order denominated as a temporary restraining order is actually a preliminary injunction, we review the duration of the order; "whether it was issued after notice and a hearing"; the extent of evidence submitted to the district court; and the continuing safeguards installed by the district court. *McDougald*, 786 F.2d at 1472. After review of the district court's orders, we conclude that they are in fact appealable preliminary injunctions. *See* November 3 Order. With respect to the district court's October 31 Order, the court explicitly referred to the order as "preliminary injunctive relief." October 31 Order at 4. Moreover, the order is of indefinite duration; it was issued after notice and a hearing; the court received evidence and considered declarations from both parties (commenting that no further factual development need be made before ruling); and the court required the parties to report jointly to it every thirty days regarding the

status under its order. We conclude that the characteristics of this October 31 Order belie the district court's label as a temporary restraining order; it is in all respects an appealable preliminary injunction.[7] Thus, pursuant to 28 U.S.C. § 1292(a)(1), we have jurisdiction over an appeal from that order.

With respect to the district court's November 22 Order and November 28 Order granting HRC and the individual Haitian parties relief, but staying portions of that relief during appeal, the district court specifically stated that "pursuant to 28 U.S.C. § 1292(b), the court finds that this Order involves controlling questions of law regarding the rights of [migrants] in Guantanamo Bay which are subject to a difference of opinion and that an immediate appeal may advance the ultimate termination of this case." November 22 Order at 2. On December 1, 1994, we exercised our discretion and permitted appeal from these orders, and accordingly, we take jurisdiction of this appeal under 28 U.S.C. § 1292(b).

2. *Standing*

In its appeal to this court for emergency relief from the district court's October 31 order, the government raised a question regarding the standing of the Cuban Legal Organizations and the

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[7] In *Sampson v. Murray*, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974), the Supreme Court observed:

> A district court, if it were able to shield its orders from appellate review merely be designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding. In this case, where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified.

Id. at 86-87, 94 S.Ct. at 951. Such is the case here.

individual Cuban plaintiffs relative to the putative injuries to parties not before the court, specifically all those migrants who expressed a written desire to be repatriated. Appellants' Mot. for Summ. Reversal, or, in the Alternative for An Emergency Stay Pending Appeal (or a Writ of Mandamus), *CABA II*, at 22 n. 65 (filed Nov. 2, 1994). These migrants were prevented from returning to Cuba by the district court's oral order on October 25, 1994, and by the October 31 Order. After our November 7 Order, repatriation of those who had expressed in writing a desire to return to sovereign Cuba was continued as arranged with the Cuban government. Appellant's Brief at 6 n. 2. But for our stay, the remaining Cuban migrants in Camp November who had requested to be returned to Cuba would be affected by the district court's order barring their repatriation.

The principle of standing is "derive[d] from the Article III limits on the jurisdiction of federal courts." *Jackson v. Okaloosa County*, 21 F.3d 1531, 1536 (11th Cir.1994).

> Before rendering a decision ... every federal court operates under an independent obligation to ensure it is presented with the kind of concrete controversy upon which its constitutional grant of authority is based; and this obligation on the court to examine its own jurisdiction continues at each stage of the proceedings, even if no party raises the jurisdictional issue and both parties are prepared to concede it.

Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 759 (11th Cir.1991). We recognize two components to the standing doctrine: the minimum constitutional requirements of Article III and the prudential considerations of judicial self-government. *Harris v. Evans*, 20

F.3d 1118, 1121 (11th Cir.) (en banc), *cert. denied*, ____ U.S. ____, 115 S.Ct. 641, 130 L.Ed.2d 546 (1994); *F.D.I.C. v. Morley*, 867 F.2d 1381, 1386 (11th Cir.), *cert. denied*, 493 U.S. 819, 110 S.Ct. 75, 107 L.Ed.2d 41 (1989). To meet the irreducible minimum constitutional requirements, the plaintiff must show "(1) that he has suffered an actual or threatened injury, (2) that the injury is fairly traceable to the challenged conduct of the defendant, and (3) that the injury is likely to be redressed by a favorable ruling." *Harris*, 20 F.3d at 1121; *accord Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982); *Jackson*, 21 F.3d at 1537; *Morley*, 867 F.2d at 1386. The party must also show that prudential considerations do not weigh against consideration of the claims. Harris, 20 F.3d at 1121; *Morley*, 867 F.2d at 1386. We have identified three particular situations in which we will decline to address a party's claim for prudential reasons: "(1) assertion of a third party's [putative] rights rather than individual legal rights; (2) allegation of a generalized grievance rather than an injury peculiar to such litigant; or (3) assertion of an injury outside the statute's or constitutional provision's zone of interests." *Morley*, 867 F.2d at 1386.

For each claim stated in a complaint, there must be a plaintiff who will achieve some redress by the court's actions. *Jackson*, 21 F.3d at 1536. As of this interlocutory appeal, the classes sought have not been certified; neither the Cuban Legal Organizations nor the individual Cuban plaintiffs represent the approximate 1000 Cuban residents of Camp November who expressed their desire in writing to be returned to sovereign Cuba as soon as possible. "Inclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if the persons described in the class

definition would have standing themselves to sue." *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. Unit A July 1981); *accord Church v. City of Huntsville*, 30 F.3d 1332, 1340 (11th Cir.1994) ("[U]nless ... one of the *named* plaintiffs is in real and immediate danger of being personally injured ... the plaintiff class lacks standing...."); *Jones v. Firestone Tire and Rubber Co.*, 977 F.2d 527, 531 (11th Cir.1992) (holding that a party may only represent a class to "the extent that he has standing to ring individual claims"), *cert. denied*, —U.S.—, 113 S.Ct. 2932, 124 L.Ed.2d 682 (1993). We conclude that the plaintiffs in this case are not suffering any real or threatened injury by the repatriation of any migrant who has expressed, in writing, his or her desire to be returned to sovereign Cuba. None of the individual Cuban plaintiffs claims to have requested repatriation. Therefore, all of the individual Cuban plaintiffs are outside the group who is being affected directly by the district court's October 31 Order barring repatriation without prior consultation with a lawyer. However, the individual Cuban migrants may properly challenge the United States' repatriation policies to the extent that they allege that they may suffer imminent injury by being coerced in the future into signing declarations of desire to repatriate or being wrongly repatriated to sovereign Cuba, whether or not they may succeed on the merits of those claims. *See Morley*, 867 F.2d at 1387 (holding that standing is determined without considering the party's likelihood of ultimately succeeding on the merits of their claims).

B. Standard of Review

"Ordinarily, the grant of a preliminary injunction is reviewed for abuse of discretion; however, if the trial court misapplies the law we will review and correct the error without deference to that court's determination." *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir.1991) (per curiam) [hereinafter *"Baker"*], *cert. denied*,—U.S.—, 112 S.Ct. 1245, 117 L.Ed.2d

477 (1992). As discussed below, the district court misapplied the law governing the issues presented in this case. Thus, we accord no deference to the district court's determinations in granting the preliminary injunctions in this case.

C. The Merits

A preliminary injunction is extraordinary relief. *Church,* 30 F.3d at 1342. Because of the nature of a preliminary injunction, before relief can be granted, the party requesting the injunction must show: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) its own injury outweighs the injury to the nonmovant; *and* (4) the injunction would not disserve the public interest." *Baker,* 949 F.2d at 1110 (emphasis added); *accord Church,* 30 F.3d at 1342. The district court misapplied the law in this case; thus, we accord no deference to the court's decision.[8] Under the precedent of this circuit and the Supreme Court,[9] we conclude that the Cuban Legal

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[8] Despite controlling precedent in this circuit, the district court relied upon *Haitian Ctrs. Council, Inc. v. Sale,* 823 F.Supp. 1028 (E.D.N.Y.1993) *vacated by* Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994) [hereinafter *HCC*], to support its grant of the preliminary injunction as to the Cuban migrants. Whatever may be the effect in the Eastern District of New York of this now vacated district court decision in *HCC,* it has no precedential value in this circuit. Much of the reasoning in that decision is contrary to binding precedent in this circuit.

[9] We are bound by precedent established by this court, by the Fifth Circuit prior to October 1, 1981, and by the Supreme Court of the United States. *See C.G. Willis, Inc. v. Director, Office of Workers' Compensation Programs,* 31 F.3d 1112, 1115 n. 8 (11th Cir.1994) ("Only the *en banc* court or the Supreme Court may overrule the settled law of this circuit."); *Bonner v. City of Prichard,* 661 F.2d 1206, 1209, 1210 (11th Cir.1981) (en banc) (adopting the decisions of the Fifth Circuit handed down on or before September 30, 1981, as precedent in the Eleventh Circuit, reasoning that "[s]tability and predictability are essential factors in the proper operation of the rule of law."). We recognize no other legally binding precedent. While other circuit and district courts may have considered similar issues, it is the case law of this circuit which governs our decisions. Specifically, *Haitian*

Organizations, HRC, the individual Cuban plaintiffs and the individual Haitian migrants cannot meet the first prerequisite to the grant of a preliminary injunction, a showing of "substantial likelihood of success on the merits [of their claims]," and thus are not entitled to injunctive relief. *See Church*, 30 F.3d at 1342.

1. *Statutory and Constitutional Rights of Migrants in Safe Haven*

The Cuban migrants and the Haitian migrants are asserting statutory rights under the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 ("INA") and the Refugee Convention. The individual Cuban plaintiffs in safe haven also assert rights under the Cuban Refugee Adjustment Act, 8 U.S.C. § 1255, and the Cuban Democracy Act, 22 U.S.C. §§ 6001-6010. The individual Haitian unaccompanied minor plaintiffs assert rights against discriminatory parole decisions under 8 U.S.C. § 1182. Additionally, the individual Cuban plaintiffs advance claims to Fifth Amendment rights of due process, and the individual Haitian migrants are asserting Fifth Amendment rights to due process and equal protection of the laws.

a. *Status of Guantanamo Bay*

The district court in this case relied upon *Haitian Ctrs. Council, Inc. v. Sale*, 823 F.Supp. 1028 (E.D.N.Y.1993), *vacated* by Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994) [hereinafter *HCC*], in entering its order granting

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Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir.) (per curiam), *cert. denied*, —U.S.—, 112 S.Ct. 1245, 117 L.Ed.2d 477 (1992) [hereinafter *HRC II*], *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc) [hereinafter *Jean I*], *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) [hereinafter *Jean II*], and the Supreme Court's decision in *Sale v. Haitian Ctrs. Council, Inc.*,—U.S.—, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993), guide and bind us here.

the Cuban migrants meetings with lawyers upon request and barring repatriation of migrants without prior legal consultation. In the *HCC* case, the New York district court found that lawyers had a First Amendment right to free speech and association for engaging in legal consultation[10] at Guantanamo Bay because it was a naval base over which the United States has "complete control and jurisdiction" and "where the government exercises complete control over all means of delivering communication." *Id.* at 1040. The district court here erred in concluding that Guantanamo Bay was a "United States territory." October 31 Order at 9. We disagree that "control and jurisdiction" is equivalent to sovereignty. *See* Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 26, 1903, U.S.-Cuba, T.S. No. 418 (distinguishing between sovereignty of the Republic of Cuba over the leased land and the "control and jurisdiction" granted the United States), *reprinted in* 6 Bevans 1113-15; *cf. United States v. Spelar,* 338 U.S. 217, 221-22, 70 S.Ct. 10, 12, 94 L.Ed.3 (1949) (construing the Federal Tort Claims Act not to apply to an American military air base in Newfoundland because the lease between Newfoundland and the United States "effected no transfer of sovereignty with respect to the military bases concerned").

The Cuban Legal Organizations and HRC attempt to circumvent precedent in this circuit by arguing that *Haitian Refugee Ctr., Inc. v. Baker,* 953 F.2d 1498 (11th Cir.) (per curiam), *cert. denied,* —U.S.—, 112 S.Ct. 1245, 117 L.Ed.2d 477 (1992) [hereinafter "*HRC II*"], in contrast with the instant case, dealt solely with Haitians who were interdicted on the high seas and returned to Haiti by United States Coast Guard cutters.

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[10] The Eastern District of New York declined to decide whether the migrants at Guantanamo Bay themselves had any First Amendment rights. *HCC,* 823 F.Supp. at 1041.

However, we also addressed the claims of Haitians who were interdicted on the high seas and then transported to Guantanamo Bay. *See HRC II*, 953 F.2d at 1514; *id.* at 1516-17 (Hatchett, J., dissenting). Based upon our holding in HRC II, 953 F.2d at 1510, we again reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are "functional[ly] equivalent" to being land borders or ports of entry of the United States or otherwise within the United States.[11] Therefore, any statutory or constitutional claim made by the individual Cuban plaintiffs and the individual Haitian migrants must be based upon an extraterritorial application of that statute or constitutional provision.

b. *Extraterritorial Application of Legislation and the Constitution*

If the migrants have been provided rights by statute,[12] we need not reach the constitutional questions urged upon us. However, because the Cuban Legal Organizations and HRC struggle to re-assert statutory claims foreclosed by *HRC II* and *Sale v. Haitian Ctrs. Council, Inc.*,—U.S.—, 113 S.Ct. 2549, 125

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[11] Panama regained sovereignty over the Panama Canal Zone and the area where the United States maintains military installations by the Panama Canal Treaty of 1977. Panama Canal Treaty, Sept. 7, 1977, U.S.-Pan., art. III, § 1, art. IV, § 2,33 U.S.T. 39; Panama Canal Treaty, Implementation of Article IV, Sept. 7, 1977, U.S.-Pan., art. I, annex A, 33 U.S.T. 307.

[12] Domestic legislation is not presumed to apply extraterritorially absent express Congressional authorization. *See Sale*, —U.S. at —, —, —, 113 S.Ct. at 2561, 2562, 2567 ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has responsibility.").

L.Ed.2d 128 (1993), and fail to assert new meritorious statutory claims, we reach the constitutional issues as well.

We decided in *HRC II*, 953 F.2d at 1510, and the Supreme Court agreed in *Sale*,—U.S. at —,—, 113 S.Ct. at 2557-58, 2563, that the very same statutes and treaties regarding repatriation, Article 33 of the Refugee Convention,[13] and the INA, specifically, 8 U.S.C. § 1253(h)[14] and 8 U.S.C. § 1158(a)[15] do not apply extraterritorially. In *HRC II*, we unequivocally held that

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[13] Article 33 of the Refugee Convention states in pertinent part that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality ... or political opinion." Refugee Convention, *supra*, art. 33, 19 U.S.T. at 6276. We have held that this article is not self-executing, but must be given force by enactment of domestic legislation. *Baker*, 949 F.2d at 1110.

[14] Section 1253(h)(1), the domestic legislation implementing Article 33, provides that "[t]he Attorney General shall not deport or return any alien ... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality ... or political opinion." Nothing in this statute extends its application "beyond the borders of the United States." *HRC II*, 953 F.2d at 1509-10.

The individual Cuban plaintiffs also assert rights under 8 U.S.C. §§ 1101(a)(42), 1157(c), 1182, 1225, 1226, and 1362; however, because these provisions merely supplement rather than address the questions presented to us, we consider their claims as being made under § 1253(h) and § 1158(a).

[15] Section 1158(a) provides that:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

§ 1158(a). We have found that the "clear meaning of this language" is that persons interdicted before reaching the United States cannot base a right to asylum or asylum processing on this provision. *HRC II*, 953 F.2d at 1510.

the interdicted Haitians could not claim any rights under sections 1253(h) or 1158(a). We further concluded that:

> the interdicted Haitians [on Coast Guard cutters and at Guantanamo Bay] have *none of the substantive rights*—under ... the 1967 United Nations Protocol Relating to the Status of Refugees, the Immigration and Naturalization Service Guidelines, the Refugee Act of 1980, the Immigration and Nationality Act, or international law—that they claim for themselves or that the HRC claims for them.

HRC II, 953 F.2d at 1513 n. 8 (emphasis added). These laws, which govern repatriation of refugees, bind the government *only* when the refugees are at or within the borders of the United States. *See id.* at 1509-10. Therefore, the claims asserted by the migrants under the INA and under Article 33 continue to be untenable.

The individual Cuban plaintiffs attempt to utilize the Cuban Refugee Adjustment Act, 8 U.S.C. § 1255, and the Cuban Democracy Act, 22 U.S.C. §§ 6001-6010, to assert the right of the Cuban migrants to seek parole and asylum in the United States. While these acts acknowledge the political climate in Cuba, provide for economic sanctions for dealing with Cuba, and allow for certain rights for Cubans who reach the United States, they do not address the rights of Cuban migrants to enter or to seek entry to the United States initially, nor do they confer directly any rights upon the Cuban migrants outside the United States. Hence, neither of these acts can be relied upon by the individual Cuban plaintiffs to assert a right against repatriation or to seek parole or asylum in the United States from safe haven.

Right to Counsel

The individual Cuban plaintiffs and the individual Haitian migrants claim a due process right to obtain and communicate with

legal counsel of their choice regarding asylum application or parole in order to protect an interest against being wrongly repatriated from safe haven. In order for the migrants to have a right to counsel, they must first have a protectable liberty or property interest. *See Board of Regents v. Roth*, 408 U.S. 564, 569-572, 92 S.Ct. 2701, 2705-06, 33 L.Ed.2d 548 (1972). The Executive Branch has made the policy decision not to offer preliminary refugee determination interviews, or "screening"[16] to the Cuban or Haitian migrants. In previous Haitian migrant cases, migrants who had been held to have a liberty interest to which due process could attach were "screened-in" by the government. *See HCC*, 823 F. Supp. at 1042; *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1345 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S.Ct. 3028, 125 L.Ed.2d 716 (1993). In this case we need not decide whether any such putative liberty interest arises from being "screened-in." As discussed below, no such procedure was undertaken.

The individual Cuban and Haitian plaintiffs have argued that the processing which occurs when migrants are brought into safe haven is similar to the screening procedure which takes place when the government attempts to discern if a migrant is a refugee. However, providing safe haven residency is a gratuitous humanitarian act which does not in any way create even the putative liberty interest in securing asylum processing that the

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[16] "Screening" is a preliminary process during which a determination may be made that the migrant has a well-founded fear of persecution if repatriated. *See Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1345 (2d Cir.1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, ___ U.S. ___, 113 S.Ct. 3028, 125 L.Ed.2d 716 (1993). If the migrant is preliminarily ascertained to have a well-founded fear of persecution if repatriated, the migrant is "screened-in." *See id.* If after an interview, the determination is made that the migrant does not have such a fear, then the migrant is "screened-out" and repatriated.

Second Circuit found that initial screening creates. *See McNary*, 969 F.2d at 1345 ("By these humanitarian actions alone [(rescuing the migrants from the sea and bringing them to Guantanamo Bay)], it does not appear that the legal status of the aliens was altered. However, once the interdicted persons have been 'screened in' the appellants[] ... can fairly be said to have established a reasonable expectation in the 'screened in' plaintiffs in not being wrongly repatriated ...."). We also note that the district court mistakenly relied upon the *HCC* case, because that case addressed only the plight of Haitian migrants who had been "screened in" as possible refugees. *HCC*, 823 F. Supp. at 1041 ("Here, the Haitian Service Organizations have been retained by the *Screened In* Plaintiffs and have asserted a right to speak with their clients, the *screened-in* Haitians." (emphasis added)). The migrants in this case have not been "screened in" or otherwise processed for asylum. By bringing the migrants to safe haven, the government has not created any protectable liberty or property interest against being wrongly repatriated and the migrants may not rest a claim of right of counsel and information on the due process clause.

Unaccompanied Minor Haitians' Right to Parole

The individual unaccompanied minor Haitian migrants are asserting statutory and constitutional equal protection claims to be paroled into the United States on the same basis that unaccompanied minor Cubans have been or may be paroled into the United States.[17] The unaccompanied minor Haitian migrants claim that the Attorney General has abused her discretion under the

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[17] "Parole is an act of extraordinary sovereign generosity, since it grants temporary admission into our society to an alien who has no legal right to enter ...." *Jean I*, 727 F.2d at 972.

INA, 8 U.S.C. § 1182,[18] by paroling in Cuban unaccompanied minors but not Haitian unaccompanied minors. While this claim is not dependent upon the extraterritorial application of the statute, it fails nonetheless. We agree with our *en banc* court's statement in *Jean v. Nelson*, 727 F.2d 957, 981-82 (11th Cir. 1984) (en banc) [hereinafter "*Jean I*"], *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) [hereinafter "*Jean II*"], that "there is little question that the Executive has the power to draw distinctions among aliens based on nationality." *Jean I*, 727 F.2d at 978 n. 30; *see generally*, Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (1990), *reprinted in* 8 U.S.C. § 1157. This authority extends both to the President of the United States and to the Attorney General.[19] *Jean I*, 727 F.2d at 978. Aliens may be excluded or denied parole on grounds that might be "suspect in the context of domestic legislation," because "there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States

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[18] Section 1182(d)(5)(A) provides in part:

> The Attorney General may ... in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergency reasons or for reasons deemed strictly in the public interest any alien applying for admission into the United States ....

§ 1182(d)(5)(A).

[19] We note, however, that in the Supreme Court's affirmance of *Jean I*, its holding was limited to whether "'low-level ... government officials [may] act in such a manner which is contrary to federal statutes ... and the directions of the President and the Attorney General, both of whom provided for a policy of non-discriminatory enforcement.'" *Jean II*, 472 U.S. at 853, 105 S.Ct. at 2996 (first omission added) (quoting Brief for Pet'rs at 37). While we held in *Jean I* that lower-level Immigration and Naturalization Service officials could not disregard the orders of their superiors, here we are faced with the extensive authority of the Attorney General and the President to make distinctions on the basis of citizenship and the political climate of the alien's homeland.

or what procedures will be used to determine their admissibility." *Id.* at 965 n. 5. Here, the Attorney General has exercised her discretion on the legitimate basis of the very different political climates in Haiti, under the newly restored democratic President Jean-Bertrand Aristide on the one hand, and in Cuba, under the regime of Fidel Castro on the other. *See Garcia-Mir v. Smith*, 766 F.2d 1478, 1492 (11th Cir.1985) (per curiam) (holding Attorney General need only assert a "'facially legitimate and bona fide'" reason for a parole decision (quoting *Jean I*, 727 F.2d at 977)), *cert. denied*, 475 U.S. 1022, 106 S.Ct. 1213, 89 L.Ed.2d 325 (1986). Thus, we hold that the statutory claims made by the unaccompanied minor Haitian migrants are without merit and cannot justify an injunction directing the government to parole them into the United States. Because we conclude that the statute alleged does not protect the unaccompanied Haitian minors, we address their constitutional equal protection claim.

In *Jean I*, we held that unadmitted and excludable aliens "*cannot claim equal protection rights under the Fifth Amendment, even with regard to challenging the Executive's exercise of its parole discretion.*" 727 F.2d at 970 (emphasis added).[20] The plaintiffs in Jean I could not "challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole, on the basis of the rights guaranteed by the United States

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[20] Although the Supreme Court held that we should not have reached the constitutional issue in that case because "the current statutes and regulations provide petitioners with nondiscriminatory parole consideration – which is all they seek to obtain by virtue of their constitutional argument," *Jean II*, 472 U.S. at 854-55, 105 S.Ct. at 2997, our *en banc* holding in that case regarding the constitutional issue remains viable as the Supreme Court did not vacate the opinion but affirmed and remanded on alternative grounds. *See also Perez-Perez v. Hanberry*, 781 F.2d 1477, 1479 (11th Cir.1986) (dictum); *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir.1985) (per curiam) (dictum); *Jean v. Nelson*, 863 F.2d 759, 770 (11th Cir.1988) (dictum), *aff'd*, 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990).

Constitution," *id.* at 984, because they had "no constitutional rights with regard to their applications," *id.* at 968; *accord Landon v. Plasencia*, 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative."); *cf. Perez-Perez v. Hanberry*, 781 F.2d 1477, 1479 (11th Cir.1986) ("The world is not entitled to enter the United States as a matter of right."). The individual unaccompanied Haitian migrants here, who are outside the borders of the United States, can have no greater rights than aliens in Jean I who were physically present in the United States. *See Landon*, 459 U.S. at 32, 103 S.Ct. at 329 ("[H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.").

In *HRC II*, we concluded that the interdicted Haitians on Coast Guard cutters and at Guantanamo Bay did not possess any of the statutory rights they claimed under the INA and the Refugee Convention, or the constitutional rights they claimed under the due process clause of the Fifth Amendment, *and* the First Amendment. *HRC II*, 953 F.2d at 1503, 1511 n. 6 (agreeing with the district court that the Haitian migrants had no "correlative First Amendment rights of their own"). Our decision that the Cuban and Haitian migrants have no First Amendment or Fifth Amendment rights which they can assert is supported by the Supreme Court's decisions declining to apply extraterritorially either the Fourth Amendment, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75, 110 S.Ct. 1056, 1066, 108 L.Ed.2d 222 (1990) (rejecting Fourth Amendment limits to search and seizure of property owned by a non-resident alien conducted in Mexico by United States agents), or the Fifth Amendment, *Johnson v. Eisentrager*, 339 U.S. 763, 784, 70 S.Ct. 936, 947, 94 L.Ed. 1255 (1950) (rejecting claim that aliens outside the sovereign

territory of the United States are entitled to Fifth Amendment rights). *Cf. Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion) (holding the right to a jury trial applies to an *American citizen* abroad being tried by a United States military court (narrowest holding)). Clearly, aliens who are outside the United States cannot claim rights to enter or be paroled into the United States based on the Constitution.

Therefore, any right to equal protection of the laws, due process, or rights under the INA or the Refugee Convention now asserted by the Haitian and Cuban migrants are not cognizable. Thus, neither group of migrants could have a "substantial likelihood of success on the merits" which is a necessary predicate to the grant of injunctive relief. The district court erred in granting relief to the individual Cuban and Haitian migrants.

2. *First Amendment Rights of the Cuban Legal Organizations and HRC*

Both the Cuban Legal Organizations and HRC claim a First Amendment right to freedom of association with the migrants and free speech such that the government must provide the lawyers access to clients and any other migrants who request counsel. In *HRC II*, we held that the two primary First Amendment cases recognizing a First Amendment right for a lawyer to solicit a client for the purpose of engaging in litigation as a form of political expression, *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), "recognize a *narrow* First Amendment right to associate for the purpose of engaging in litigation as a form of political expression." *HRC II*, 953 F.2d at 1513 (emphasis added). However, we concluded that "[t]his right is predicated upon the existence of an *underlying legal claim* that

may be asserted by the potential litigant ...." *Id.* (emphasis added).[21]

Neither the Cuban nor the Haitian migrants have any of the statutory or constitutional rights claimed here that might sustain the attorneys' claims to right of association, and "associational freedom in no way implies a right to compel the Government to provide access to those with whom one wishes to associate." *Id.* Hence, it would be not only improper, but also "nonsensical," for us to hold today that attorneys for either migrant group suddenly possess "a right of access to the interdicted [migrants] for the purpose of advising them of their legal rights." *Id.*

Because, under precedent of this circuit, neither the migrants nor the lawyers may assert First Amendment rights of association and speech in this context, we need not determine whether the government engaged in any viewpoint-based discrimination in denying the Cuban Legal Organizations and HRC access while granting humanitarian organizations access. Providing humanitarian organizations access to the migrants does not, without more, create a First Amendment right to that access for those humanitarian organizations or for the Cuban Legal Organizations and HRC. If the First Amendment does not apply to the migrants or to the lawyers at Guantanamo Bay, the government cannot be engaging in impermissible viewpoint-based discrimination by restricting association between the migrants and counsel. *Cf. Perry*

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[21] *Button* and *In re Primus* "do not recognize a right of access to persons properly in government custody," *HRC II*, 953 F.2d at 1512, which is what the Cuban Legal Organizations and HRC have requested. The lawyers' claims under the First Amendment do not require that the government assist it in communicating with clients or potential clients in safe haven. *Id.* at 1513. Although the attorneys argue that they require no financial assistance or transportation from the government, for the lawyers to meet with their clients, assistance is necessarily required in providing access to the base, meeting areas, accommodations and security.

Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44, 46, 103 S.Ct. 948, 954, 955, 74 L.Ed.2d 794 (1983) (holding first that the First Amendment applied to teachers' mailboxes in a public school, but that the "'First Amendment does not guarantee access to property simply because it is owned or controlled by the government,'" and that there was no First Amendment right to access to the mailboxes (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2684, 69 L.Ed.2d 517 (1981))).[22]

For the above reasons, an injunction requiring the government to provide reasonable and meaningful access of legal counsel to the migrants in the safe haven, based on First Amendment rights of the attorneys is not justified.

3. *Disclosure of Haitian Migrants' Identities*

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[22] We recognize that the *HCC* court found that "First Amendment [is] applicable to U.S. conduct on a military base." 823 F. Supp. at 1040. The court cited *Flower v. United States*, 407 U.S. 197, 198-99, 92 S.Ct. 1842, 1843-44, 32 L.Ed.2d 653 (1972) (per curiam) for this proposition. From our reading of *Flower* we find it is clearly distinguishable. The military base in question in *Flower* was Fort Sam Houston in San Antonio, Texas; not Guantanamo Bay or an installation in Panama. There, a civilian (an American citizen) was arrested for distributing leaflets on an [sic] road within the fort. The Supreme Court found that the road was essentially a public one as there was "no sentry post or guard at either entrance or anywhere along the route," *Flower*, 407 U.S. at 198, 92 S.Ct. at 1843 (quoting *United States v. Flower*, 452 F.2d 80, 90 (5th Cir. 1972) (Simpson, J. dissenting)), and more than 15,000 cars travelled through the fort each day via this road. These are facts not remotely analogous to the access policies at Guantanamo Bay, Cuba, or presumably at the installations in Panama. Moreover, the Supreme Court has recognized the limited nature of its holding in *Flower*. *See Greer v. Spock*, 424 U.S. 828, 835, 96 S.Ct. 1211, 1216, 47 L.Ed.2d 505 (1976); *U.S. v. Albertini*, 472 U.S. 675, 684-86, 105 S.Ct. 2897, 2904-05, 86 L.Ed.2d 536 (1985); *see also M.N.C. of Hinesville, Inc. v. U.S. Dept. of Defense*, 791 F.2d 1466, 1473 n. 3 (11th Cir.1986). Hence, we are of the opinion that this case does not stand for the proposition that the First Amendment necessarily applies at American military bases located in foreign countries.

HRC contends that the government's refusal to disclose the identities of Haitian migrants at Guantanamo Bay violates HRC's First Amendment rights to freedom of association and violates the Haitian migrants' rights to equal protection of the laws and rights under the INA and international law. The district court, without stating its reasons, ordered that the government provide HRC a list of all Haitian migrants in safe haven. As decided above, the Haitian migrants in safe haven cannot claim the rights and privileges of the statutes enumerated or of the Constitution with respect to a right to counsel, their repatriation or parole into the United States. Thus, they cannot succeed on any claim that they have rights that are being violated by failure to disclose their identities to HRC. What remains then is a request by HRC that the government release information. Such a claim is typically made under the Freedom of Information Act; however, no claim has been made under the Act here. Instead, this claim is constitutional in nature. The Supreme Court has held that there is "no discernible basis for a constitutional duty [on the government] to disclose, or for standards governing disclosure of or access to information." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553 (1978) (plurality opinion). "This Court has never intimated a First Amendment guarantee of access to all sources of information within government control." *Id.* at 9, 98 S.Ct. at 2593-94. Because there is no authority for us to compel disclosure of the Haitian migrants' identities, we cannot force the government to provide HRC with access to the list of Haitian migrants in safe haven. *See id.*

III. CONCLUSION

While we have determined that these migrants are without legal rights that are cognizable in the courts of the United States, we observe that they are nonetheless beneficiaries of the American tradition of humanitarian concern and conduct. In the context of

the refugees' world of today (e.g., Bosnia and Rwanda) this is significant. While these migrants are faced with difficult conditions, the demonstrated concern of groups like the Cuban Legal Organizations and HRC and the goodwill of their military rescuers and caretakers will hopefully sustain and reassure them in their quest for a better life.

Nevertheless, we cannot contravene the law of this circuit and of the Supreme Court of the United States in order to frame a legal answer to what is traditionally and properly a problem to be addressed by the legislative and executive branches of our government. *See Perez-Perez*, 781 F.2d at 1479. "Although the human crisis is compelling, there is no solution to be found in a judicial remedy." *Sale*, ___ U.S. at ___, 113 S.Ct. at 2567 (quoting *Haitian Refugee Ctr. v. Gracey*, 257 U.S. App. D.C. 367, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring)). For the foregoing reasons, the preliminary injunctions issued by the district court and dated October 31, 1994, November 22, 1994, and November 28, 1994, together with our December 19 Order, are hereby DISSOLVED, and these cases are REMANDED to the district court with direction to dismiss the plaintiffs' claims.

Appendix B

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CUBAN AMERICAN BAR ASSOCIATION, INC., et al.,
Plaintiffs,

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors,

v.

WARREN CHRISTOPHER, Secretary of State, et al.,
Defendants.

Case No. 94-2183-CIV-ATKINS

The United States District Court for the
Southern District of Florida

ORDER GRANTING PLAINTIFFS' EMERGENCY
MOTION FOR TEMPORARY RESTRAINING ORDER

THIS CAUSE comes before the court on Plaintiffs' Emergency Motion for Temporary Restraining Order filed on October 24, 1994. In their Motion, plaintiffs ask this Court to enjoin temporarily the government from denying plaintiff "Cuban Refugee Service Organizations [(CRSOs)] and other lawyers" access to and communication with their clients; to order the

government to provide the CRSOs reasonable access; and to enjoin involuntary repatriation of the detained plaintiff refugees to Cuba.

The court held a hearing on plaintiffs' motion on Wednesday, October 26, 1994. Both parties were represented at the hearing and presented arguments. At the close of the hearing, the court advised the parties that it would take the matter under consideration. A review of the record suggests that a temporary restraining order is warranted in this case.

FACTUAL BACKGROUND

The genesis of this case goes as far back as 1960 and Fidel Castro's institution of a Communist regime in Cuba. Since that time, the United States has had a favorable policy towards Cubans fleeing Castro's totalitarian regime. This policy granted the Cubans refuge and asylum in the United States, eventually leading to permanent residence and citizenship.[1] At that time, and up to the recent past, the Cuban government prohibited Cubans from leaving for the United States. However, in August of 1994, the Cuban government rescinded this policy and began allowing Cubans to leave for the United States by the thousands. As a result, on August 19, 1994, President Clinton announced at a press conference that no more Cubans would be allowed into the United States and that any Cubans found at sea would be detained in Guantanamo Bay.

On September 9, 1994, as a result of negotiations between the governments of the United States and the Republic of Cuba, the two governments signed a Joint Communique designed to ensure

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[1] *See* Cuban Democracy Act, 22 U.S.C. § 6001 *et seq.*; Refugee Act of 1980, 8 U.S.C. § 1521 and Cuban Adjustment Act, 8 U.S.C. § 1255.

that migration procedures were safe and legal. The agreement will allow 20,000 Cubans entry into the United States each year. Those given permission to enter will consist of persons who qualify as refugees and their families, persons issued visas and their families and persons who are selected based on a "lottery" system. However, in order to receive any benefit from this agreement, the Cubans must return to Cuba and invoke the procedures established by recent negotiations between the United States and Cuba. Until they voluntarily decide to return, they will be held in safe havens like Guantanamo Bay. At present, the government has repatriated 42 refugees and is ready to repatriate as many as 1,014 more.

On October 11, 1994, the CRSOs and other attorneys asked the United States government for access to refugees at Guantanamo. At an October 20, 1994 meeting between the CRSOs and government representatives, the CRSOs were informed that some access would be allowed, but no specifics were given. On October 23, 1994, the CRSOs and certain detained refugees filed suit against the government alleging that the government was denying the attorneys and the detained refugees certain statutory, Constitutional and international law rights.[2] On October 24,

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[2] The plaintiffs base their claims on certain sections of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*; the Cuban Adjustment Act of 1966, 8 U.S.C. § 1255; the Refugee Act of 1980, 8 U.S.C. § 1521; the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*; the First and Fifth Amendments of the United States Constitution, and various principles of international law.

This Court has jurisdiction based on 28 U.S.C. § 1331; 8 U.S.C. § 1329; 5 U.S.C. § 702 and 28 U.S.C. §§ 2201, 2202.

1994, the government sent a letter to plaintiff attorneys granting up to six attorneys access to refugees at Guantanamo for two days. Meanwhile, the plaintiffs ask this Court to enjoin the government from denying the CRSOs unlimited access to their clients and from repatriating any more refugees before the attorneys have an opportunity to consult with them and ensure that their decision to return to Cuban is voluntary. Counsel do not dispute that refugees may repatriate of their own free will at any time. The issue is whether the detained plaintiff refugees taken by the government to Guantanamo Bay, over which area the government has complete control and jurisdiction, are entitled to advice of counsel to assure their 'voluntary' decision to repatriate.

DISCUSSION

This court may enter preliminary injunction relief, such as a temporary restraining order, only if the movant shows all of the following: (1) a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable injury if the relief is not granted; (3) that this irreparable harm outweighs the harm the relief might cause the non-movant; and (4) that the relief would not be adverse to the public interest. *Haitian Refugee Center v. Nelson*, 872 F.2d 1555, 1561-62 (11th Cir. 1989), *aff'd*, 111 S.Ct. 888 (1991).

(1) Likelihood of Prevailing on the Merits

As previously mentioned, the plaintiffs' claims are based on various statutory, Constitutional and international law principles. The plaintiffs' main contention, for purposes of this Motion,[3] is

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[3] The court emphasizes that it does not state any opinion regarding policies towards Cuba or conditions at Guantanamo. The scope of this Order is limited to the issues of right to access and voluntary repatriation. As plaintiffs argue, there are two key

that the government is denying the attorneys their First amendment rights and the detained plaintiff refugees substantive and due process rights by denying them access to their attorneys. Consequently, the plaintiffs argue that the "voluntary" repatriation of the refugees cannot in fact be voluntary absent the advice of counsel and informed consent. In support of their position, the plaintiffs ask this Court to consider *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (hereinafter *Sale*).

In response to these claims, the government argues that the detained plaintiff refugees have no substantive legal rights and, thus, the attorneys have no First Amendment right to access to them. Furthermore, even assuming the existence of a First Amendment right, that right does not mandate that the government assist the attorneys in advising their putative clients. Additionally, the government argues that the refugee's repatriation decisions are made voluntarily after full disclosure of their options. To support its arguments, the government relies on *Sale v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549 (1993) (hereinafter *HCC*) and *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir.), *cert. denied* 112 S.Ct. 1245 (1992) (hereinafter *Baker*).

The court's review of these arguments in light of the relevant law suggests a substantial likelihood that plaintiffs ultimately will prevail. First, the rules set forth in *Sale* support the plaintiffs'

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elements to voluntariness: full information so as to have informed consent and a non-coercive environment, such as adequate living conditions. At this stage, the court is only considering the issue of right to access and whether the Cuban refugees are being denied the opportunity to be fully informed, thus, preventing voluntary repatriation. The issue of adequate living conditions will be examined at a later stage, if necessary.

position. The Haitian plaintiffs in the *Sale* case asserted causes of action very similar to those asserted by the detained plaintiff refugees.[4] Additionally, *Sale* and the present case have several controlling factual similarities: 1) both the Haitians and the Cubans are being detained in Guantanamo; 2) the attorneys for both requested permission to communicate with their clients; 3) in both situations, other groups were allowed contact and communications with the detainees, indicating possible viewpoint discrimination, and 4) the attorneys in both cases sought and seek to communicate with their clients at their own expense, not the government's. Based on this similar set of facts, the *Sale* court found that:

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[4] Specifically, they alleged

> 1) denial of the Haitian Service Organizations' First Amendment rights to provide advocacy and counselling to their clients detained in Guantanamo; 2) denial of the Haitian detainees' First and Fifth Amendment constitutional rights to obtain and communicate with counsel; 3) denial of the Haitian detainees' constitutional due process right to adequate medical care, to be free of indefinite detention and arbitrary punishment; 4) failure of the Government to follow rulemaking procedures; 5) arbitrary and capricious agency action not in accordance with the law; 6) judicial enforceability of the duty of non-refoulement; and 7) equal protection.

Sale, 823 F. Supp. at 1034.

1. The United States has complete jurisdiction and control over Guantanamo Bay and, thus, the First Amendment applies there. *Id.* at 1036, 1040.

2. The government's decision to deny Haitian Service organizations (HSO) access to the detainees "is based solely on the content of what they had to say and the viewpoint they would express," *id.* at 1036, in violation of the First Amendment. *Id.* at 1041. Furthermore, the HSOs' First Amendment right does not depend on whether the detainees have a right to counsel. *Id.*

3. That the Haitians have due process rights because they "are at a military base solely because the defendants chose to take them there.... If the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin." *Id.* at 1042.

4. That the detainees had a right to review under the Administrative Procedure Act. *Id.* at 1045-49.

Therefore, it appears to this Court that the *Sale* decision suggests a substantial likelihood that plaintiffs ultimately will prevail. Notably, no appeal was taken from that ruling.[5]

Second, the cases that the government relies on for support contain significant factual distinctions. The government relies on *HCC* for the assertion that "the Supreme Court has held that section 243(h) of the [Immigration and Naturalization Act], which

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[5] Two of the defendants in *Sale* were Warren Christopher, Secretary of State, and Janet Reno, Attorney General, who are also defendants in this action *sub judice*.

the plaintiffs claim prohibits the Attorney General from repatriating Cubans from Guantanamo, does not apply to extraterritorial actions or procedures." Defendant's Opposition to Plaintiffs' Request for Injunctive Relief at 2.[6] A careful reading of *HCC* shows that this case dealt with Haitians being interdicted by the Coast Guard on the highs seas and returned *to Haiti* pursuant to an Executive Order. The Court reviewed the history of both § 234(h) and Article 33 of the United Nations Convention Relating to the Status of Refugees[7] and determined that they only apply to aliens who

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[6] Section 243(h) provides in pertinent part:

> (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.
>
> ...

Immigration and Naturalization Act § 234(h), as amended, 8 U.S.C. § 1253(h).

[7] Article 33.1 states:

> 1. No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

have already been admitted to the United States or are already *within United States territory but not yet admitted*. Accordingly, the Court concluded that neither provision placed any limitations on the President's authority to repatriate aliens *intercepted on the high seas*. *HCC* has no bearing on the present case, where the refugees are not on the high seas but rather within United States territory at Guantanamo Bay.

The government also relies on *Baker*. There, the Eleventh Circuit determined that Haitian refugees on Coast Guard cutters had no substantive legal rights. Consequently, the attorneys for the Haitians had no First Amendment right to access and advise their clients because that right was "predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant." *Baker*, 953 F.2d at 1513. The court further concluded that even assuming the attorneys have some right of access, the Constitution does not require the government to assist the attorneys in obtaining that access. While these rulings facially appear to be binding on the present case, the factual distinctions between *Baker* and the present case indicate that the opposite is true.

The first significant distinction is that *Baker* focuses on the Haitian refugees located on Coast Guard cutters outside United States territory.[8] Conversely, the detained plaintiff refugees are located at Guantanamo, a United States territory. The fact that the Haitian refugees where on the high seas led to the *Baker* court's

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Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 6276, T.I.A.S. No. 6577.

[8] See *Baker*, 953 F.2d 1512, 1515 (Hatchett, J., dissenting) ("For the majority, that is the heart of the matter; the refugees are outside of the United States.")

ultimate determination that they had no substantive rights and, thus, the attorneys had nothing on which to base their First Amendment right to associate with and advise the Haitians. That is not the case here. As the *Sale* decision indicates, once the Cuban refugees where detained in Guantanamo, they became entitled to certain due process and substantive rights, which serve as a predicate to the CRSOs' First Amendment claim in this case.

Another distinction is the fact that the plaintiffs in *Baker* did not allege any viewpoint discrimination.[9] The opposite is true here. The detained plaintiff refugees, like in *Sale*, are alleging that while they are being denied access to and communication with the refugees, other groups are not, resulting in viewpoint discrimination by the government.

A third vital distinction is that the *Baker* plaintiffs were asking the government for assistance in obtaining access to the refugees at extreme cost to the United States. The court presumed that this meant finding and funding transportation to the cutters or bringing the Haitians ashore, concluding that such assistance "would impose a substantial burden on the United States." *Id.* at 1514. No such burden exists here. The CRSOs have repeatedly indicated that they are ready to provide transportation and shelter at their own expense. All they ask of the government is to provide access and a forum. In light of the fact that the government has given permission for six attorneys to travel to Guantanamo for two days, there does not appear to be any substantial burden on the government.

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[9] "The district court noted that there was no allegation that the government's denial of access to the interdicted Haitians was the product of viewpoint discrimination." *Baker*, 953 F.2d at 1512 n.7.

Having determined, for purposes of the present inquiry, that the *Sale* case is most factually related to the present case and that the cases the government relies on are inapplicable because of material distinctions, the court finds that the facts demonstrate a substantial likelihood that plaintiffs will prevail on the merits. Accordingly, plaintiffs have satisfied the first requirement for preliminary injunctive relief.

Irreparable Harm

Plaintiffs have demonstrated irreparable injury in the absence of a temporary restraining order in the form of declarations indicating that many detained plaintiff refugees may suffer persecution and other negative consequences if repatriated to Cuba. Additionally, irreparable injury will result if these detained plaintiff refugees are repatriated without being afforded their substantive and due process rights. The government has already repatriated forty-two (42) Cuban refugees. Another one thousand fourteen (1,014) are ready to be processed for repatriation. There is no question in the court's mind that the harm that would result from repatriating these refugees to a country from which they risked their lives to flee, without providing them their rights and determining if their decisions are truly voluntary, is unquestionably irreparable.

Balance of Hardships

In considering the balance of hardships, courts take into account the burdensomeness of a temporary restraining order on the defendants. 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948 at 447 (1973). The court's review of the record suggests that any burden to the government in this case is minimal. The CRSOs have indicated that they are not asking the government to subsidize access to the detained refugee plaintiffs. The only 'burden' on the government is to

provide access and the proper forum. In light of the fact that the government has already agreed to limited access, the court finds that this burden is substantially outweighed by the above-described irreparable harm to the plaintiffs.

Disservice to Public Interest

Finally, the government has failed to show, and the record does not reveal, any disservice injunctive relief would cause to the public interest. Therefore, the court finds that no disservice to the public interest would result from the present temporary restraining order.

CONCLUSION

Having considered the filings and oral argument of counsel, it is

ORDERED AND ADJUDGED that:

1. Plaintiffs' October 24, 1994 Emergency Motion for Temporary Restraining Order is ***GRANTED*** as follows:

(a) Defendants shall refrain from denying Cuban Refugee Service Organizations and other counsel reasonable and meaningful access to the detained refugee plaintiffs; and

(b) Defendants shall refrain from repatriating any detained plaintiff refugees, including those twenty-three (23) persons who were the subject of the temporary restraining Order entered October 25,1994, without permitting them access to counsel and receipt of full information so as to assure an informed and voluntary decision to seek repatriation.

2. Plaintiffs shall deposit, no later than 5:00 p.m. on November 1, 1994, the sum of $500.00 into the court registry to serve as security during the pendency of this Order.

3. Counsel are to submit within five (5) days a proposed agreed plan for the visitation of a requisite number of lawyers for the necessary time to conduct the proposed interviews of the subject refugees. If counsel cannot agree on appropriate details of the arrangements, the court will, on application, consider appointing a Special Master to supervise the proceedings.

4. Counsel are to submit a joint report every 30 days as to the progress in accomplishing the above objectives.

5. This Order will remain in effect until further order of the court. In light of the twenty-four (24) declarations submitted by the parties, the court assumes no further factual development is to be made and the court may proceed to enter a Preliminary Injunction, preserving all objection heretofore made. However, if counsel desire a further hearing to submit additional, nonduplicative evidence, in support of their respective positions, they are to advise the court in writing within five (5) days of the file date of this Order.

DONE AND ORDERED at Miami, Florida, this 31st day of October, 1994 at 3:05 p.m.

/s/ C. Clyde Atkins
SENIOR UNITED STATES DISTRICT JUDGE

cc: Counsel of record.

Appendix C

Constitutional And Statutory Provisions Involved

28 U.S.C. § 2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

U.S. Constitution Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1182(d)(5)(A):

The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

22 U.S.C. § 6001 (1)-(2):

The Government of Fidel Castro has demonstrated consistent disregard for internationally accepted standards of human rights and for democratic values. It restricts the Cuban people's exercise of freedom of speech, press, assembly, and other rights recognized by the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948. It has refused to admit into Cuba the representative of the United Nations Human Rights Commission appointed to investigate human rights violations on the island.

The Cuban people have demonstrated their yearning for freedom and their increasing opposition to the Castro Government by risking their lives in organizing independent, democratic activities on the island and by undertaking hazardous flights for freedom to the United States and other countries.

Appendix D

Excerpts From Deposition Of Brunson McKinley
November 29, 1994

22-23

Q: The repressive totalitarian regime, to use your words, that existed in 1992 in Cuba, is that regime still in place today, sir?

A: Yes.

Q: Did anything occur on August 19, 1994, with regard to the totalitarian political situation in Cuba — did anything change about it?

A: Not to my knowledge.

Q: The policy change that President Clinton announced on August 19, to your knowledge, and I assume this is your area of expertise, did that affect the people fleeing Cuba on that date?

A: Yes, it did.

Q: And the effect of that policy was supposed to be from that day forward. Is that your understanding?

A: Yes, it is.

Appendix E

Excerpts From Petitioner's Class Action Complaint
Filed October 24, 1994

STATEMENT OF FACTS

23. Fidel Castro's seized control of the Cuban Government in 1959 and since then has maintained a dictatorial regime of oppression and terror on the island nation.

24. As evidenced by United States statutory provisions, Congressional intent and the policies and administrate the practices of the last United States presidential administrations, the United States, for almost 35 years, has condemned Castro's Communist regime. The brutality and oppression of Castro's regime has been well documented. The United States has repeatedly sought condemnation of Castro's human rights abuses in the United Nations and other forums. Beginning in approximately 1960, when the Cuban Refugee Assistance Program was created, until President Clinton's announcement on August 19, 1994, the United States government continually encouraged and permitted Cuban refugees fleeing that regime to enter the United States freely and to seek permanent residence status.

. . .

38. Since 1960 and continuing through the passage and aftermath of the Cuban Democracy Act, Cuban refugees have continued to flee Castro's oppressive regime and seek permanent resident status in the United States, which embraced them until August 19, 1994. On that day, the United States government began instead arbitrarily to intercept fleeing Cubans on the high seas and to detain them in barbed-wire enclosed, military detention

camps at Guantanamo and other locations. The Detained Refugee Plaintiffs and all the others similarly situated, escaped from Cuba on rafts and other floating devices, in reliance upon prior United States policy, law and practice permitting and encouraging them to travel to the United States to gain refuge from Castro's regime.

IMMEDIATE EVENTS GIVING
RISE TO THIS LAWSUIT

39. The political conditions in Cuba have not changed since the Cuban Adjustment Act, the 1980 Refugee Act, or the Cuban Democracy Act were enacted. To the contrary, the Castro regime continues its reign of oppression and terror. Cuban refugees continue to seek refuge in the United States. Since the 1960's, masses of Cuban refugees have risked death in unseaworthy flotation devices and watercraft, risking shark-infested, rough seas in hopes of reaching the United States.

40. On July 13, 1994, approximately 70 Cuban refugees including many women and children, boarded the tug *13 de Marzo* in Cuba in an attempt to escape Castro's brutal regime. The attempt ended when Cuban patrol boats repeatedly rammed the boat and blasted the tugboat with high-pressure hoses until the boat capsized and sank. Approximately 41 people were killed, including many children. The Cuban government subjected the survivors to political persecution and imprisonment.

. . .

54. Since the August 19, 1994 announcement, defendants have engaged in a pattern and practice of intimidating and coercing the Detained Refugee Plaintiffs, of denying their rights to have their persecution claims processed, and of wilfully relying upon false information to effect coerced repatriations, and of wrongfully refusing to grant the Detained Refugee Plaintiffs

parole from detention. These practices include, but are not limited to:

(a) Barring the Detained Refugee Plaintiffs from presenting, and being represented by counsel regarding, their asylum claims.

(b) On information and belief, defendant officials have prepared inaccurate and misleading reports regarding the situation in Cuba, the reliability of the Cuban government, and the credibility of persons fleeing Cuba.

. . .

Defendants' Coercion of Detained Refugee Plaintiffs to Return Home

55. On information and belief, defendants have sought to discourage Plaintiffs from pursuing their persecution claims by (i) advising and encouraging Plaintiffs to return to Cuba to initiate and process their refugee claims; (ii) stating and implying that conditions in Cuba are now safe for their return; (iii) suggesting that Plaintiffs have no right to obtain entry into the United States as refugees and will remain confined at Guantanamo indefinitely unless they agree to return to Cuba; and (iv) otherwise circulating false and misleading information.

56. On information and belief, Christine Shelley, Acting Spokesperson for the United States Department of State, in announcing the measures taken by the United States to implement the migration agreement with Cuba, confirmed that "the programs will be available to Cubans in Cuba proper. All Cubans in safe havens will be fully informed about the programs; [but] in order to participate in them, they must return home."

57. On information and belief, Ralph B. Thomas, Acting Director—Congressional Relations for the defendants,

confirmed the United States government's intent and effort to "encourage those persons currently in safe havens to consider voluntary return to Cuba . . . [because] [t]he Cuban government has promised no punitive actions against persons who return from safe havens."

Appendix F

Excerpts From Letter From Alejandro Licea Ferrer
To Cuban American Lawyers

Camp Foxtrot
November 7, 1994

Respected Cuban American Lawyers,

First, our most sincerest greetings, in the name of myself and my compatriots in Camp Foxtrot, who present ourselves to you.

I would like for you to allow me to fully explain the situation that is confronting all of us brethren "in" this camp. The major part of the 94 people that make up this camp come from Santiago de Cuba, and we arrived at Guantanamo Naval Base "on" the 10th of August, 1994. The Naval Base authorities were aware of this. Those which attended to us previously, like SSGT Flores and SSGT Mercado, respected US Navy personnel that cared for us in the transient location for political immigrants from the east zone [Freedom House], of which transient location we are able to show photographs. Finding ourselves there attended by Mr. Jack Lonengan who told us that our documents had been processed to the United States and that the copies of these documents could be found in SSGT Fullar, Patiel — Chief N-2 #4210, and that after a few days they were transferred to the office of SSGT Flores, #4121, we have the address of this office because he gave it to us when he had to travel to the US.

Being in the transient home, we saw the flight of 17 August 1994 at 0900. The authorities told us that the flight next week would be ours. We did not know that a massive exodus was

happening. On the 19th of August 1994, we heard over the radio and television in the transient home, Channel 23 and 5, the policy announced by President Bill Clinton.

It was at this point that the confusion among us began, brought about by the lies and deceits. The authorities arrived at the transient home and informed us that we would leave at dawn, because all who leave GTMO do so secretly. We considered that the first lie, because GTMO has processed thousands of rafters from the eastern zone during the more than 35 years of Castro's dictatorship.

On the 25th of August, 1994, the authorities told us, and explained that we had to get out of the transient home to go to the camp in which we belong right now. They came back on 27 August, 1994 in a bus, full of military personnel, with shields and sticks. They told us that they were putting in the transient home sick Cubans with tuberculosis, and that we had to move out in five minutes.

We were transferred to Camp Foxtrot against our will.

. . .

We await your benevolence.

Respectfully,

Alejandro Licea
Leader, Camp Foxtrot

Appendix G

Transcript Of The President's News Conference
Announcing Detention Policy
August 19, 1994

The President. Good afternoon. In recent weeks the Castro regime has encouraged Cubans to take to the sea in unsafe vessels to escape their nation's internal problems. In so doing, it has risked the lives of thousands of Cubans and several have already died in their efforts to leave.

This action is a cold-blooded attempt to maintain the Castro grip on Cuba and to divert attention from his failed Communist policies. He is trying to export to the United States the political and economic crises he has created in Cuba, in defiance of the democratic tide flowing throughout this region.

Let me be clear: The Cuban Government will not succeed in any attempt to dictate American immigration policy. The United States will do everything within its power to ensure that Cuban lives are saved and that the current outflow of refugees is stopped.

Today, I have ordered that illegal refugees from Cuba will not be allowed to enter the United States. Refugees rescued at sea will be taken to our naval base at Guantanamo, while we explore the possibility of other safe havens within the region. To enforce this policy, I have directed the Coast Guard to continue its expanded effort to stop any boat illegally attempting to bring Cubans to the United States. The United States will detain, investigate, and, if necessary, prosecute Americans who take to the sea to pick up Cubans. Vessels used in such activities will be seized.

I want to compliment the Coast Guard and the Immigration and Naturalization Service for their efforts. And I want to thank Florida's officials, including Governor Chiles and the Florida congressional delegation, for their help in protecting and saving the lives of Cubans who seek to escape the regime.

Appendix H

Deposition Of Michael Skol
December 1, 1994

147-48

Q: Do you have a general understanding as to what happens to human rights activists in Cuba?

A: Yes. It depends on how active the activist is. If the activist even begins to annoy Fidel Castro or the system, he or she is subject to various forms of harassment and arrest.

Q: If a person is involved in political activities, as distinguished from human rights activities, which the government does not agree with, are they similarly subject to political persecution and potential imprisonment?

A: Yes.

161-62

Q: Ambassador Skol, there are approximately 30,000 detainees still in Guantanamo?

A: Guantanamo and Panama there are 32,000, yes, but I would prefer not using the word detainees.

Q: What is going to happen to these people if they do not return to Cuba?

A: In the case of the oldest, the very sick, and unaccompanied minors, they will be paroled or have been paroled into the United States. The administration has also announced that it will and is studying the case of all children, all minors, in the camps. Beyond that, the policy is that they may well remain there indefinitely.

Q: For years?

A: Indefinitely.

Appendix I

Excerpts From Declaration Of Michael Skol
Principal Deputy Assistant Secretary Of State
For Inter-American Affairs, Department Of State
Dated November 23, 1994

11. The situation in Cuba presents a stark contrast to that in Haiti. Cuba remains a totalitarian state controlled by President Fidel Castro, who is Chief of State, Head of Government, First Secretary of the Communist Party, and Commander-in-Chief of the Armed Forces. President Castro exercises control over all aspects of Cuban life through a broad network of directorates ultimately answerable to him through the Communist Party, as well as through the bureaucracy and the state security apparatus.

12. The Government of Cuba sharply restricts basic political and civil rights, including freedom of expression, association, assembly and movement, as well as the right to privacy. The Ministry of the Interior is the principal organ of state security and totalitarian control and is under the *de facto* control of the Revolutionary Armed Forces, which are in turn directed by Fidel Castro's brother, Raul. The Ministry of the Interior vigorously investigates "nonconformity" and actively suppresses organized opposition and dissent against government officials. It maintains a pervasive system of vigilance through undercover agents, informers, "rapid action brigades," and "Committees for the Defense of the Revolution," which are used as a means to mobilize citizens against dissenters, to impose ideological conformity, and to root out "counterrevolutionary" behavior. Human rights activists and dissidents are often imprisoned for offenses such as "enemy propaganda," "illicit association," "contempt for authority," "Dangerousness," or the broad charge of

"rebellion." Hundreds or perhaps thousands of Cubans are in prison for various political crimes, and Cuban government authorities use the threat of prosecution to intimidate many others.

13. The Cuban people have no right to choose their leaders. The only legal political organization is the Communist Party, which is headed by Fidel Castro. Castro or subordinate party officials make all important political decisions. In the 1993 elections for the National Assembly, every candidate had to be screened by a "Candidacy Commission" composed of representatives of party-controlled "mass organizations." Only one candidate per seat was allowed. These procedures ensured that only government supporters would be on the ballot. Voters were given only one option, either to vote "Yes" or to leave the ballot blank. Formation of political parties, campaigning, and making campaign promises were forbidden.

Appendix J

Excerpts From
Declaration Of Jesús Sanchilema
Dated October 19, 1994

1. The detainee patients I interviewed stated that it was difficult for them to obtain permission to see a physician or other health care provider at the camp infirmary. They complained that the wait for obtaining medical services was lengthy and unreasonable, and that medication was scarce. One patient named Carlos Mendoza Moreno told me that he had been physically mistreated by the military and had observed the beating of another detainee by military personnel.

. . .

6. Dr. Guerra additionally advised me that the diet served to infants and children at the camp was improper and dangerous for children.

7. Dr. Guerra expressed concern over the inappropriate and unsanitary condition of the camp, and its effect on the health of children at the camps.

. . .

8. I observed that the children are not separated from the general population of the detainees in any manner whatsoever and, as a result, are susceptible to diseases and illnesses that might accompany these conditions.

. . .

12. I observed a dead rat that apparently had been killed in Oscar II, the "family camp." The rat was approximately 12" long (including its tail).

13. I filmed camp Oscar II and some of the conditions therein. I filmed a row of portable toilets commercially marketed as "portolets" that had been closed, according to one of the detainees, just a few days before my arrival. One of the portolets marked "woman" (in Spanish), which I observed, had fecal material to the rim of the toilet in which worms were swimming.

. . .

18. I visited several children, many of them infants, and in many cases the infants were completely naked because of a lack of clothes. I have personal knowledge that the military personnel did not allow the distribution of donated clothing and food to the detainees.

. . .

34. Several people told me that they desired legal representation. The videotape depicts one gentleman holding a sign which states: "Provide legal representation to your Cuban brothers" (in Spanish).

35. . . . The military officer told me that each detainee had the "right" to appeal the sentence given to him by a military officer by appealing to the sentencing officer's superior officer. General Williams told me that he understood that the detainees had no rights to legal representation nor a right to due process.

Appendix K

Excerpts From Declaration Of Monsignor Bryan Walsh Dated October 21, 1994

1.My name is Bryan Walsh, Monsignor, and I am currently the Executive Director of Catholic Community Services, Inc. The information provided herein is based upon my first hand personal knowledge.

3.There are approximately 20 detention camps housing Cuban detainees. Each camp is surrounded by walls consisting of rolls and rolls of very sharp razor wire. There is nothing protecting the detainees, especially the children, from these razor wires.

4. The detainees are being kept in temporary tents which are subject to excruciating heat and other elements. . .

. . .

9. To the best of my knowledge, the detainees have not been provided with any clothing since their arrival at the camps. It appears that they only possess the clothing they were wearing when they escaped from Cuba.

14. The food being provided to the detainees is in the form of "meals ready to eat" (MREs). While at the detainee camps I personally had one. While the meal is palatable, it is by no means pleasurable to eat, nor is it because of its high content of salt and sodium, healthy.

Appendix L

IN THE
UNITED STATES COURT OF APPEALS,
FOR THE ELEVENTH CIRCUIT

CUBAN AMERICAN BAR ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors-Appellees,

v.

WARREN CHRISTOPHER, Secretary of State, et al.,
Defendants-Appellants.

No. 94-5138

November 7, 1994.

Before KRAVITCH, BIRCH and CARNES, Circuit Judges.

BY THE COURT:

The court denies the appellants' motion for summary reversal with respect to the order of the district court entered on October 31, 1994 denominated "Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order" ("the Injunction"). The parties are instructed to file briefs on the schedule set out below.

This court hereby stays all of the district court's injunctive relief set out in the Injunction exception as hereafter provided:

(a) defendants shall afford reasonable and meaningful access for legal counsel (i.e., officers of the court) to only the named detained plaintiffs and any other detainees who in the future request counsel by written declaration;

(b) plaintiff organizations and counsel need not be afforded access to any other detainees pending the resolution of this appeal;

(c) the defendants may repatriate all current detainees in "Camp November" who have expressed a desire, by written declaration, to be returned to sovereign Cuba;

(d) the defendants may repatriate any other detainees who express a desire by written declaration to be returned to sovereign Cuba; and

(e) the defendants shall not repatriate any detainees who do not express, by written declaration, a desire to be returned to sovereign Cuba.

The briefing schedule is as follows: the government's opening brief is due November 21, 1994; the appellees' answer brief is due December 7, 1994; and the government's reply brief, if it chooses to file one, will be due December 14, 1994. These dates are the date that the briefs must be received in the Clerk's Office and in the office of opposing counsel.

Counsel are advised that all Eleventh Circuit rules relating to the length and format of the brief, including type size and margins and footnotes must be strictly adhered to. Counsel are further advised that the court will not grant any motion to file a brief exceeding the page limitations or any motions for an extension of time to file a brief.

Oral argument will be held on Monday, December 19, 1994 at 10:00 a.m. at 56 Forsyth Street, Atlanta, Georgia. Each side shall be allotted 45 minutes for argument.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I concur in the order of the Court denying Appellants' Motion for summary Reversal. I also concur in that portion of the stay relating to the District Court's injunctive relief except as to paragraph (b) of this Court's order, from which I dissent. I would permit legal counsel, pending the resolution of this appeal, to have access to any detainee, who has not expressed the desire to be returned to sovereign Cuba, under such reasonable conditions as would be set by the District Court.

Appendix M

Excerpts From Plaintiffs' Response To Defendants' Reply To Plaintiffs' Status Report Concerning Access To Guantanamo

November 16, 1994

1. The Defendants continue to argue, even at this stage of the litigation, that Plaintiffs' attorneys "were informed that they would be authorized to meet with plaintiffs on October 20, 1994." Defendants are mistaken. . . .

2. The Defendants, of course, then make reference, once again, to Commissioner Meissner's letter of October 24, 1994. However, as the attached letter dated November 15, 1994, re: Access to Refugee Camps, from Roberto Martinez to Associate Deputy Attorney General Seth Waxman, attached hereto as Exhibit "B" demonstrates, even Commissioner Meissner's promises have not been honored by the Government. The Government continues to discriminate against the attorney plaintiffs in providing access to the refugee camps, in violation of the First Amendment to the Constitution of the United States. . . .

3. Defendants further state in their reply that: "Defendants have outlined to plaintiffs an orderly plan for plaintiffs' attorneys to have ongoing access to their clients." Defendants cite as supporting authority a letter attached as Exhibit "C" to Defendants' Reply to Plaintiffs' Status Report Concerning Access to Guantanamo from Associate Deputy Attorney General Seth Waxman to Roberto Martinez. However, upon even a cursory review of the Waxman letter it is apparent that no such orderly plan is described. Instead, Mr. Waxman conditions the

development of "a regular plan for access" upon "our experience next week." As the Government should know, however, a plan for "reasonable and meaningful access" does not depend upon executive whim, but upon the First Amendment to the Constitution of the United States and the mandates from both the Eleventh Circuit and this Court.

4. As the letter dated November 15, 1994, re: Access to Refugee Clients Pursuant to the Eleventh Circuit's Mandate, from Roberto Martinez to Seth Waxman, attached hereto as Exhibit "C" demonstrates, Plaintiffs have been attempting to develop a regular and orderly plan for "reasonable and meaningful access" for approximately two weeks. On November 3, 1994, counsel for Plaintiffs forwarded to Assistant United States Attorney Dexter A. Lee a proposal for attorney access to the refugee clients. Although approximately two weeks have lapsed since the letter of November 3, 1994, was telefaxed to Mr. Lee, the Government has not yet responded to said letter.

5. The rest of Defendants' reply is self-serving and irrelevant to the question of access. If the conditions at Guantanamo "are crowded and overburdened" and Guantanamo "remains a very sensitive location" as defendants claim, those factors are simply the fault of defendants for warehousing in barbed-wire enclosed tents approximately 25,000 Cuban refugees and thousands more Haitian refugees. That should in no way serve as an excuse for defendants' denial of reasonable and meaningful access. Also, the fact that other allegedly "competing groups," such as church groups and celebrities, want to visit Guantanamo, only underscores the gross nature of defendants' viewpoint discrimination in limiting the access of plaintiffs' attorneys to the camps themselves and to all refugees at Guantanamo, including those at Camp November. See Declaration of Ramon Rasco (detailing how access to camps, including Camp November, has

been denied). Apparently, all groups except plaintiffs' counsel can visit the camps and speak with the refugees there.

6. Defendants' reply is nothing more than a shameful backpedaling attempt to "spin" the prior events in a manner favorable to the Government.

7. As the Government knows, there are now approximately fifteen thousand (15,000) Cuban refugees who have in writing requested counsel. The Eleventh Circuit's mandate orders the Government to provide reasonable and meaningful access to the refugee clients. There is currently no plan for such access.

Appendix N

Excerpts From
Deposition Of Major Barry Keith,
November 23, 1994

5

Q Now, before you went down there or were assigned to the Task Force on August 19, 1994, what group or unit were you assigned to at that time?

A I'm with the Psy-Op, First Psychological Operations Battalion, First Psychological Group, Fort Bragg, North Carolina.

60

Q Forget the word effort. What was the intent?

A Well, the intent was to identify things that might be detrimental to the Cubans or to the calmness of the camp situation. It was bad enough.

Q Right. You didn't want to broadcast anything that would further [incite] them or would upset them?

A Right. Basically.

Appendix O

Excerpts From Letter From Seth Waxman
Office Of The Deputy Attorney General,
To Roberto Martinez And Ira J. Kurzban
December 2, 1994

Dear Messrs. Martinez and Kurzban:

In light of the District Court's November 22 and 28 orders granting counsel for provisional intervenors reasonable and meaningful access to certain eligible migrants, it is necessary to establish a protocol for access by attorneys for both groups. To guarantee fair access to the limited resources at Guantanamo Bay Naval Base, the following procedures have been developed, consistent with the Principles of Access previously filed with the Court. Requests for access not consistent with these procedures likely will be declined.

To ensure that attorneys from both groups obtain reasonable and meaningful access consistent with the base's limited facilities and personnel, attorneys for plaintiffs and provisional intervenors will be granted visiting time on alternate weeks. For example, attorneys for the Cuban migrants are scheduled to visit Guantanamo Bay during the week of November 28, 1994. Attorneys for the Haitian migrants, therefore, will have access to the base during the week of December 5, 1994. This arrangement will remain in effect until such time as one group of attorneys has met privately with each individual who has requested such a meeting in writing, or until such time as counsel for the two groups establish an alternate time-sharing arrangement consistent with the following parameters, or until a court decision no longer requires the government to provide access to Guantanamo.

1. All attorney visits will last for no longer than three (3) consecutive days (although attorneys may arrive the evening before the first day of visiting). No more than six (6) attorneys representing one group of plaintiffs (i.e. *Cubans or Haitians*)—will be permitted to visit the base during any given week.

2. To obtain theater and country clearance onto the base, at least five (5) working days before the desired arrival each attorney must provide Lieutenant Colonel Robert Hudson (or other contact we may designate in the future), at (703) 693-9848, with his or her name, organization, Social Security number or passport number, and dates of proposed arrival and departure.

Appendix P

Excerpts From Translation Of Handwritten Letter From Jesús Andrés Barroso

Guantánamo Bay, December 4, 1994

To the Attorney:

I hereby request legal representation to process my immigration in the United States, and advice on my rights to request political asylum, as well as a private consultation with you to explain my personal situation which I will present in general.

With respect to my very special case, I was on American soil between August 17 and August 19 of the current year; during those two days I remained at Biscayne ("Bisquein") (sic.)) Bay at the entrance of the Miami channel. After that, I was transferred to Key West and later on to Guantanamo Bay where I have remained until this date trusting that justice will be made. To support my story, I have films, photographs, recorded telephone conversations which are in the hands of my sponsor, Santa Aguial; her telephone number is: (305) 556-8932.

My name is: **Jesús Andrés Barroso Jiménez** (a former political prisoner, under file No. 668/1980 and my number is: 000 840 297. My wife's name is: Dianey Hector Serpa. Place of origin: Matanzas. My present place of stay: McCalla 6 Camp, Tent 3-18.

Thanking you, I remain, your client, Jesús Andrés Barroso.

There is an illegible signature.

Appendix Q

Department Of Justice Press Release
December 2, 1994

DEPARTMENT OF JUSTICE TO REVIEW CUBAN CHILDREN'S CASES INDIVIDUALLY

Attorney General Janet Reno announced today that at the direction of the President, she will consider the humanitarian parole, on a case-by-case basis, Cuban children for whom long-term presence in the safe havens at Guantanamo or Panama would constitute an extraordinary hardship, together with such immediate family members as humanitarian needs require.

Only families for whom there is full financial sponsorship in the United States will be paroled.

Appendix R

Excerpt From Article Appearing In *The Miami Herald*
United Way Launches Guantanamo Job Service
By John Lantigua
June 22, 1995

The order in which the refugees will come [to the United States] is determined by a lottery. Klingler said the sooner a refugee is expected to leave the camp, the higher up he will be on the list for job counseling.

Appendix S

Excerpt From Statement Of
Attorney General Janet Reno
May 2, 1995

I would like to make an announcement regarding Cuban migration.

Following recent diplomatic exchanges with the Cuban government, the United States is now prepared to take another important step towards regularizing Cuban migration between Cuba and the United States.

First, with respect to Guantanamo:

- We will continue to bring to the United States those persons who are eligible for special humanitarian parole under the guidelines announced by the President last October and December.
- The government of Cuba has agreed to accept all Cuban nationals in Guantanamo who wish to return home, as well as persons who have previously been deported from the United States and persons who would be ineligible for admission to the United States because of criminal record, medical, physical, or mental condition, or commission of acts of violence while at Guantanamo.
- All other Cubans in the safe haven will be considered for entry into the United States on a case-by-case basis as "Special Guantanamo Entrants", bearing in mind the impact of paroles on state and local economies and the need for adequate sponsorships. . . .

Second, with regard to future irregular migration:

- Effective immediately, Cuban migrants intercepted at sea attempting to enter the United States, or who enter Guantanamo illegally, will be taken to Cuba, where U.S. consular officers will assist those who wish to apply to come to the United States through already established mechanisms. Cubans must know that the only way to come to the United States is by applying in Cuba.

. . .

- Migrants intercepted at sea or in Guantanamo will be advised that they will be taken back to Cuba, where U.S. consular officials will meet them at the dock and assist those who wish to apply for refugee admission to the United States at the Interests Section in Havana.

Appendix T

No. 95-528

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

Chris Sale, Acting Commissioner,
Immigration and Naturalization Service, et al.,

Petitioners,

VS.

Warren Christopher, Secretary of State, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

And, if the Second Circuit's affirmance of the preliminary injunction at issue here should later become moot prior to the Court's disposition of the petition for certiorari, the proper course would be to vacate the decision of the Second Circuit, not to deny the petition. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Appendix U

No. 92-528

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

Chris Sale, Acting Commissioner,
Immigration and Naturalization Service, et al.,
Petitioners,

VS.

Warren Christopher, Secretary of State, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

2. On June 11, 1993, respondents filed a supplemental brief in this Court, stating that the entry of the June 8 order dissolves the preliminary injunction and renders proceedings on appeal of that injunction moot. Respondents argue that the Court should therefore deny our pending certiorari petition seeking review of the Second Circuit's affirmance of the preliminary injunction.

We agree that the preliminary injunction now is moot. As we stated in our reply brief (at 10), however, the proper disposition in the event of mootness is not to deny the petition, but rather to grant the petition and vacate the judgment of the court of appeals as moot. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *University of Texas v. Camenisch*, 451 U.S. 390 (1981).

Appendix V

Excerpts From Article Appearing In *The Miami Herald*

AROCHA SEES FRIEND IN GUANTANAMO VISIT

December 1, 1994

Guantanamo Bay, Cuba — Three years ago, Rene Arocha and his best friend Euclides Rojas slipped away from the Cuban national baseball team during a seven-hour layover at Miami International Airport.

. . .

That day came Tuesday, Arocha, now a pitcher with the St. Louis Cardinals, and Rojas, a refugee in limbo, reunited inside a cramped tent at the army base here.

Arocha, the first Cuban national team baseball player to defect, came as part of a humanitarian relief effort organized by Marlins third-base coach Cookie Rojas, the Kiwanis Club of Little Havana and the Puente de Jóvenes Profesionales Cubanos.

Oakland A's slugger Ruben Sierra and Marlins director of international operators Tony Perez also made the trip to deliver $60,000 worth of supplies. Among the cargo: 11,200 pairs of underwear, 3,500 bras, 5,000 radios and 10,000 batteries, 120 baseballs, 18 gloves and 10 bats.

Appendix W

Excerpts From The Declaration Of Nicholas Rizza
Dated October 23, 1994

---

1. My name is Nicholas Rizza and I submit this declaration based upon my personal knowledge and data upon which I commonly and typically rely in my professional capacity.

. . .

4. I have knowledge concerning the plight of the Cuban refugees being detained at the U.S. Naval Base at Guantanamo Bay, Cuba ("Guantanamo"), based upon facts made known to me through Amnesty International researchers.

. . .

7. On September 25 and 26, 1994, a delegation of Amnesty International researchers visited the Cuban refugee camps established at Guantanamo.

8. During the course of Amnesty International's visit to the Cuban refugee camps, our researchers were permitted free access to tour the camps and speak with the detained Cubans who fled Cuba and were picked up at sea by United States authorities.

9. Based upon the findings of our researchers, Amnesty International and I have concluded that a substantial number of the approximately 32,000 Cubans who are now held at Guantanamo and other locations face a significant risk of human rights violations if they return to Cuba.

10. U.S. officials currently insist that Cubans being forcibly detained at Guantanamo and other locations cannot enter the United

States without returning to Cuba to request the necessary visa at the U.S. Interests Section in Havana.

11. During the course of the late September 1994 visit at Guantanamo, our researchers were permitted to freely interview in private any Cuban detainee with whom they wished to speak.

12. In total, our researchers met with leaders and people from most of the 25 or so Cuban detention camps.

13. Our researchers were also afforded the opportunity to interview at great lengths numerous people who had a history of political persecution in Cuba.

No. 95-84

In the Supreme Court of the United States

OCTOBER TERM, 1995

CUBAN AMERICAN BAR ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

WARREN CHRISTOPHER, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the judgment of the court of appeals should be vacated.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-84

CUBAN AMERICAN BAR ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

WARREN CHRISTOPHER, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 43 F.3d 1412. The order of the district court (Pet. App. 33a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1995. A petition for rehearing was denied on April 18, 1995. See Brief for the Federal Respondents in Opp., App. at 1a-2a (No. 94-1611).[1]

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[1] On March 31, 1995, prior to the disposition of petitioners' rehearing petition, the intervenor-plaintiffs filed a petition for

The petition for a writ of certiorari was filed on July 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1994, the government of Cuba publicly announced that it would cease enforcing emigration controls. Shortly thereafter, tens of thousands of Cuban migrants took to the seas in an effort to reach the United States. See No. 94-5138, Court of Appeals Record Excerpts (R.E.) 253-257, 266-268. Most of the migrants employed vessels that "were no more than makeshift rafts." R.E. 293. Many Cuban migrants lost their lives, and the lives of thousands more were placed at risk. *Ibid.* Responding to the crisis, the President emphasized that the Cuban government would not be permitted to succeed in any attempt to dictate American immigration policy, and that the United States would do everything within its power to ensure that Cuban lives were saved and the mass outflow stopped. R.E. 257.

Before the crisis, this country's policy was to bring to the United States all Cuban migrants rescued at sea. R.E. 293. Such migrants were routinely granted parole, see 8 U.S.C. 1182(d)(5)(A), despite the irregular ways in which they may have reached this country. R.E. 270. In response to the sudden and massive outflow of Cuban migrants, however, the United States altered its policy. On August 18, 1994, the President directed that those rescued at sea be provided safe haven at facilities outside the United

---

a writ of certiorari. On June 19, 1995, this Court denied that petition. See *Haitian Refugee Ctr., Inc.* v. *Christopher*, 115 S. Ct. 2578.

States, primarily at the United States naval base located at Guantanamo Bay, Cuba. R.E. 257, 293.[2] Some Cuban migrants were also afforded safe haven at United States military installations in Panama. As a result of the new policy, 32,780 Cuban migrants were provided safe haven by the United States at Guantanamo and in Panama.

On September 9, 1994, the United States reached an agreement with Cuba, seeking to "normaliz[e] migration procedures" and "to ensure that migration between the two countries is safe, legal, and orderly." R.E. 270. In order to "deter further dangerous migration from Cuba, and to provide Cubans seeking entry into the United States a safe alternative to boat departures," the United States agreed to take steps to make it less attractive for Cubans to attempt to reach the United States in an irregular manner. R.E. 294. The United States agreed to expand the provisions for the legal migration of Cubans. At least 20,000 Cubans will be authorized each year to enter the United States legally, including persons who qualify as refugees and their families, persons issued preference immigrant visas and their families,

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[2] The naval base at Guantanamo Bay is in territory of the Republic of Cuba. That base exists pursuant to a lease agreement with the Republic of Cuba. In the agreement, the parties explicitly recognize "the continuance of the ultimate sovereignty of the Republic of Cuba over those land and water areas." Agreement between the United States of America and the Republic of Cuba for the Lease (Subject to Terms to be Agreed Upon by the Two Governments) to the United States of Lands in Cuba for Coaling and Naval Stations, Art. II (Feb. 23, 1903); 6 C. Bevans, *Treaties and Other International Agreements of the United States of America: 1776-1949*, at 1113-1114 (1971).

and persons who are selected through a special parole program. The United States agreed to process applications under the expanded immigration provisions only from Cuban nationals in Cuba (not including those at Guantanamo). The United States also agreed, as a one-time measure, to parole into the country all eligible Cubans on the worldwide visa waiting list as of September 9, 1994, on whose behalf petitions for immigration had been filed. R.E. 270-271, 294.

The agreement also described the United States' policy decision, adopted before the conclusion of the agreement, that migrants rescued at sea will no longer be permitted to enter this country; instead, such migrants are to be taken to safe havens outside the United States. R.E. 270-271, 294. The United States and Cuba agreed "that the voluntary return of Cuban nationals who arrived in the United States or in safe havens outside the United States on or after August 19, 1994" would "continue to be arranged through diplomatic channels." R.E. 271.

2. a. The petitioners in this case include several migrant Cubans and several legal service organizations. In October 1994, petitioners filed a class action against various federal officials, seeking to bar the repatriation of Cuban migrants. Petitioners claimed, *inter alia*, that the repatriation was not voluntary because the migrants had not been provided counsel and allegedly were kept in unacceptable living conditions. They claimed that the repatriation violated the migrants' rights under the Fifth Amendment of the United States Constitution, Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6276, 189 U.N.T.S. 176, and 8 U.S.C. 1182(d)(5). The legal service organ-

izations also asserted a right to be allowed access to all of the migrant Cubans at Guantanamo.

b. Although the district court did not formally certify a class, the court entered an injunctive order granting class-wide relief. The district court barred further repatriation of any Cuban migrants and required the government to grant the plaintiff-attorneys "reasonable and meaningful access" to all of the migrants at Guantanamo. Pet. App. 44a.

c. On October 31, 1994, several Haitian migrants and the Haitian Refugee Center (HRC) sought to intervene in the lawsuit. They requested a bar on repatriation of the Haitian migrants at Guantanamo and an order mandating that HRC be afforded access to them. The district court provisionally granted intervenor status to HRC and the Haitian migrants. Nos. 94-5231 & 94-5234 (11th Cir.), R.E. 92. The court subsequently issued an order that, *inter alia*, required the government to grant counsel for HRC "reasonable and meaningful" access to all named Haitian migrants and any other Haitian requesting counsel. *Ibid.*

3. On appeal, the Eleventh Circuit dissolved the district court's preliminary injunctions and remanded with directions to dismiss petitioners' claims. Pet. App. 2a, 32a. The court of appeals held that the naval base at Guantanamo Bay is not located in United States territory. *Id.* at 18a-19a. Based on its own precedents and on this Court's decision in *Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2557-2558 (1993), the court held that the provisions of law on which petitioners relied—8 U.S.C. 1158(a) and 1253(h), and Article 33 of the United Nations Convention Relating to the Status of Refugees—do not have extraterritorial effect, and that petition-

ers' claims under those provisions were therefore "untenable." Pet. App. 20a-22a.

The court of appeals also rejected the individual Haitian and Cuban migrants' contention that the Due Process Clause of the Fifth Amendment afforded them a "right to obtain and communicate with legal counsel of their choice regarding asylum application or parole in order to protect an interest against being wrongly repatriated from safe haven." Pet. App. 22a-23a. The court held that providing safe haven residency was a "gratuitous humanitarian act," *id.* at 23a, and it concluded that, "[b]y bringing the migrants to safe haven, the government has not created any protectable liberty or property interest against being wrongly repatriated and the migrants may not rest a claim of right of counsel and information on the due process clause," *id.* at 24a.

The court of appeals also held that the legal service organizations lacked a First Amendment right to obtain access to the migrants at Guantanamo. Pet. App. 28a-30a. While recognizing that lawyers have "a *narrow* First Amendment right to associate for the purpose of engaging in litigation as a form of political expression," the court stated that "[t]his right is predicated upon the existence of an *underlying legal claim* that may be asserted by the potential litigant." *Id.* at 28a (quoting *Haitian Refugee Ctr., Inc.* v. *Baker*, 953 F.2d 1498, 1513 (11th Cir.) (per curiam), cert. denied, 502 U.S. 1122 (1992) (emphasis added by court below)). Having rejected the migrants' underlying statutory and constitutional arguments, the court rejected the legal organizations' First Amendment claims. Pet. App. 29a-30a. The court further noted that it "need not determine whether the government engaged in any viewpoint-based

discrimination in denying the Cuban Legal Organizations and HRC access while granting humanitarian organizations access." *Id.* at 29a. The court observed, however, that "[p]roviding humanitarian organizations access to the migrants does not, without more, create a First Amendment right to that access for those humanitarian organizations or for the Cuban Legal Organizations and HRC." *Ibid.*

4. On March 31, 1995, HRC and the Haitian migrants filed a petition for a writ of certiorari from the Eleventh Circuit's decision. They argued, *inter alia*, that the treatment of the Haitian migrants violated the Fifth Amendment and the Immigration and Nationality Act, and that the government had violated the First Amendment rights of HRC by denying it access to the Haitian migrants at Guantanamo. On May 31, 1995, the Cuban migrants and the Cuban legal service organizations (whose petition for rehearing in the court of appeals had by then been denied) filed a brief "fully support[ing] the grant of certiorari." No. 94-1611, Brief of Respondents, Cuban American Bar Ass'n, et al., at 3. They represented that they would "expeditiously [file] their own petition for writ of certiorari," *ibid.*, and they requested that this Court either defer ruling upon the HRC petition until that time or grant the HRC petition and their own petition and set the two cases for argument in tandem, *id.* at 4. On June 19, 1995, this Court denied the petition for certiorari. *Haitian Refugee Ctr., Inc.* v. *Christopher*, 115 S. Ct. 2578.

5. On May 2, 1995, the United States announced a new policy regarding the Cuban migrants. Under the new policy, the Cuban migrants at Guantanamo will continue to be considered for special humanitarian parole into the United States. Pet. App. 77a. The

Cuban government agreed to accept any Cuban migrants who wished to return, as well as persons found ineligible for admission into the United States. *Ibid.* All other Cubans at Guantanamo will be considered on a case-by-case basis for parole as "Special Guantanamo Entrants," bearing in mind the impact on state and local economies and the adequacy of sponsorship for the migrants in the United States. *Ibid.* Under the new policy, any Cuban migrants intercepted at sea will be taken to Cuba, where U.S. consular officers will assist them in applying for admission to the United States. *Id.* at 78a.

At this date, we are informed by the Defense Department that just under 11,000 Cuban migrants remain at Guantanamo.

ARGUMENT

Petitioners' request for vacatur of the Eleventh Circuit's decision is without merit. The case is not moot, and the possibility of mootness at some future date provides no basis for vacating the court of appeals' decision. Even if the case were to become moot prior to this Court's disposition of the petition, moreover, vacatur would be appropriate only if the court of appeals' decision presented issues warranting this Court's review. Petitioners can make no such showing. The court of appeals' decision is correct, presents no conflict with any decision of another court of appeals or of this Court, and (as the Court's previous denial of the Haitian intervenors' petition for certiorari from the same court of appeals decision indicates) does not warrant further review by this Court. The petition should therefore be denied.

1. a. There is no basis for petitioners' contention that the government's May 2, 1995, policy announcement "rendered this case moot." Pet. 10. ~~Approx-~~ Just under 11,000 ~~imately 14,000~~ Cuban migrants currently remain at Guantanamo. They are being considered for parole into the United States on a one-by-one basis. We are informed by the State Department that this process will not be complete until at least March 1996. Among those remaining at Guantanamo are at least two of the ten named class representatives, Nestor Rodriguez Labori and Jovani Miguel Fiffe Pino, who have not yet entered into the parole process. Petitioners are also free to attempt to add additional migrants as class representatives in order to increase the likelihood that class claims will continue to present a live case until this Court's disposition of the petition. Moreover, although the class of Cuban migrants was not formally certified by the district court, the relief granted by the district court pertained to all of the Cuban migrants at Guantanamo. In the court of appeals, petitioners sought to defend that class-wide relief. See also Pet. i (parties to the proceedings include individual plaintiffs "on behalf of themselves and all others similarly situated"). It is therefore appropriate in assessing the mootness of the case to treat the district court's order as *de facto* certifying the class action.

b. Even if the class claims of the Cuban migrants were to be deemed moot when the last named class representative is either paroled or repatriated, the claims of the petitioner legal service organizations would remain alive. In the court of appeals, those organizations submitted declarations evidencing that more than 11,000 of the Cuban migrants had expressly requested their representation. See No. 94-5138,

Brief of Plaintiffs-Appellees at 3, 52 n.27. The organizations claimed to represent all of those migrants and asserted a right to enter the military base at Guantanamo to meet with their "clients." Because petitioner legal service organizations have hundreds, if not thousands, of "clients" remaining at Guantanamo, their First Amendment claims of access are not moot. The possibility of mootness at some future date does not authorize vacatur of the court of appeals' decision.

2. Even if the case were to become moot prior to this Court's disposition of the petition, the petition should be denied. Where a case becomes moot during the pendency of a petition for a writ of certiorari, the judgment of the court of appeals should be vacated only if the case would otherwise have warranted this Court's review. Because the Eleventh Circuit's decision in this case raises no issue warranting this Court's plenary consideration, vacatur is not appropriate.

a. Most of the cases cited by petitioners in support of vacatur (Pet. 11-12) became moot either before the court of appeals rendered its judgment, or after this Court had granted the petition for a writ of certiorari.[3] A litigant has a *right* to appellate review

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[3] See *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 69-70 (1983) (per curiam) (moot while pending on remand before the court of appeals); *Preiser* v. *Newkirk*, 422 U.S. 395, 400-401 (1975) (moot after this Court granted certiorari); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (moot while on appeal; addressing the vacatur of the district court's order); *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936) (per curiam) (moot while on appeal); *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 389 (1994) (moot after this Court granted certiorari).

that should not be frustrated by the "vagaries of circumstance." *U.S. Bancorp. Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994). This Court has accordingly explained that, "[w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below," *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936) (per curiam), so long as the mootness does not result from the voluntary act of the party seeking appellate review, see *Bonner Mall*, 115 S. Ct. at 391-393. Similar principles govern vacatur of a court of appeals decision when a case becomes moot after this Court has granted a petition for a writ of certiorari. See *ibid.*

That rationale for vacatur does not apply, however, where the case becomes moot *after* the court of appeals has entered final judgment and while a petition for a writ of certiorari is pending. A losing party has no right to Supreme Court review, which is discretionary and exercised circumspectly. See Sup. Ct. Rule 10.1. Mootness during the pendency of a certiorari petition provides a basis for vacatur only if the case would otherwise have warranted review by this Court. If the Court would have denied certiorari in any event, there is no unfairness in leaving the lower court's decision intact. See Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 Mich. L. Rev. 946, 953-958 (1980). Indeed, where the judgment would not otherwise have been reviewed by this Court, vacatur would disserve the public interest by eliminating a presumptively correct judicial precedent, cf. *Bonner Mall*, 115 S. Ct. at 392, 393, unfairly deprive the respondent of any collateral benefit that might inure from the judgment,

and confer upon the petitioner a windfall that it would not have secured if the controversy had remained live.

Accordingly, the long-standing position of the United States has been that, when a case becomes moot while a petition for a writ of certiorari is pending, the petition should be denied if the case would not have warranted review on the merits. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900); U.S. Br. as Amicus Curiae Supporting Respondents at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam) (No. 92-1123); Reply Br. at 6, *Keough* v. *American Policyholders Ins. Co.*, cert. denied, 114 S. Ct. 682 (1994) (No. 93-320); U.S. Br. as Amicus Curiae Supporting Petitioner at 8 n.6, *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, *supra* (No. 93-714). See also R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 724 & n.29 (7th ed. 1993) ("[T]he Court has seemingly accepted the suggestion of the Solicitor General that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review. In such cases the Court will merely deny certiorari.") (footnote omitted).[4] Although this Court has never expressly

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[4] Petitioners erroneously contend (Pet. 16-17) that the Solicitor General has sought and received vacatur under like circumstances and that equity therefore supports vacatur here. As discussed above, it has been the government's consistent position that, where a case becomes moot during the pendency of a certiorari petition, the decision below should be vacated only if the case would otherwise have warranted this Court's review. The example cited by petitioners (Pet. 16-17) is entirely consistent with that position. The government filed a

endorsed that standard, the Court has simply denied certiorari in a number of those cases (including *Velsicol* itself) and thus decidedly has not automatically vacated a lower court decision whenever a case has become moot while a petition for certiorari was pending.[5] The approach described

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petition for certiorari from *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326 (2d Cir. 1992), challenging the Second Circuit's affirmance of a preliminary injunction. After the petition was filed, the district court entered a permanent injunction in the case. The government subsequently requested that the Second Circuit's judgment be vacated, and this Court vacated that judgment as moot. *Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) (*Sale II*). Because the government had urged the Court to grant plenary review of the Second Circuit's decision prior to the issuance of the permanent injunction, our subsequent request for vacatur (as well as the Court's order granting that relief) was fully consistent with the government's long-standing position that vacatur is appropriate in this context only if the decision below would have warranted review on certiorari. There is also no basis for petitioners' assertion (Pet. 17) that the government's unilateral actions mooted that case and caused this Court to vacate the Second Circuit's decision. The permanent injunction issued by the district court, not any "unilateral" action by the government, caused the issues regarding the preliminary injunction to become moot. See *University of Texas* v. *Camenisch*, 451 U.S. 390, 394 (1981). Moreover, contrary to petitioners' suggestion, the district court's subsequent vacatur of its permanent injunction in that case was fully consistent with—indeed, expressly contemplated by—this Court's decision in *Bonner Mall*. See 115 S. Ct. at 393.

[5] For example, in *Keough* v. *American Policyholders Ins. Co.*, *supra*, the Solicitor General filed a petition for a writ of certiorari. While the petition was pending, both sides filed briefs with the Court agreeing that the case had become moot due to the actions of the respondent. The respondent argued that the petition should be denied. The government contended

above, moreover, is consistent with this Court's recognition that "[i]t is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate * * * equitable entitlement to the extraordinary remedy of vacatur." *Bonner Mall*, 115 S. Ct. at 392.[6]

b. The Eleventh Circuit's decision in this case presents no issues warranting this Court's review. Indeed, the claims raised by petitioners in this Court (see Pet. 18-26) closely resemble those of the Haitian intervenors in their earlier certiorari petition, which the Court has already denied, see note 1, *supra*. Vacatur is therefore inappropriate.[7]

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that the decision below should be vacated because the case, had it remained live, would have warranted this Court's review. Reply Br. at 5-6 (No. 93-320). This Court did not vacate the decision below, but instead denied certiorari and left the lower court decision intact.

[6] As noted above, see page 9, *supra*, petitioners have claimed throughout this litigation to represent (and have defended the district court's order awarding relief on behalf of) thousands of Cuban migrants at Guantanamo, and they remain free to add additional migrants as class representatives if the last of the current individual named plaintiffs is paroled into the United States or repatriated. Moreover, the parole of Cuban migrants (including any of the named plaintiffs) into the United States reflects a volitional act on their part; migrants at Guantanamo are not brought to the United States against their will. There is consequently no basis for petitioners' repeated assertions (see Pet. i, 10, 12, 14, 16) that the mootness of the case—if and when it occurs—will be the result of "unilateral" actions by the government. See *Bonner Mall*, 115 S. Ct. at 392 (parties' "equivalent responsibility for the mootness" ordinarily "constitutes a failure of equity" that makes vacatur inappropriate).

[7] Because the Haitian parties' own certiorari petition seeking review of the judgment of the court of appeals has already

i. The primary issue before the court of appeals was whether alien migrants at Guantanamo had a right to consult with a lawyer before they were repatriated. See Pet. App. 20a-22a. Petitioners based that asserted right to counsel upon Section 243(h) of the Immigration and Nationality Act (INA), 8 U.S.C. 1253(h), and Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, which, they argued, afforded the Cuban migrants at Guantanamo a right not to be repatriated. As the Eleventh Circuit recognized (Pet. App. 21a), petitioners' argument was directly contrary to *Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (*Sale I*), in which this Court squarely held that neither Section 243(h) nor Article 33 places any restriction upon the involuntary repatriation of migrants outside of the United States. See 113 S. Ct. at 2559-2567. The court of appeals correctly rejected petitioners' argument (Pet. 24 n.15) that *Sale I* was limited to migrants on the high seas. Pet. App. 22a. This Court's holding turned on the fact that the migrants in that case were located outside the borders of the United States, and the case was brought on behalf of migrants at Guantanamo as well as those interdicted on the high seas. See 113 S. Ct. at 2554-2555, 2556.[8] The Court expressly agreed with

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been denied, the judgment is final and res judicata as to them. Petitioners do not in any event have standing to seek review or vacatur of the judgment below insofar as it applies to the Haitian parties.

[8] For example, in holding that Section 243(h) of the INA did not extend to the migrants on Coast Guard cutters and at Guantanamo, this Court explained that Part V of the INA, which contains Section 243(h), does not apply "outside the United States" and is "limited to strictly domestic pro-

Judge Edwards' conclusion in *Haitian Refugee Ctr.* v. *Gracey*, 809 F.2d 794, 840 (D.C. Cir. 1987), that Article 33 "was not intended to govern parties' conduct outside of their national borders." *Sale I*, 113 S. Ct. at 2564.[9]

ii. Petitioners contend (Pet. 24-25) that, by providing "safe haven" for the Cuban migrants, the

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cedures." *Sale I*, 113 S. Ct. at 2560. See also *ibid.* (relying on "presumption that Acts of Congress do not ordinarily apply outside our borders"); *id.* at 2562 (Section 243(h) applies "in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States"). This Court likewise rejected the contention that Article 33 applies to "actions taken by a country outside its own borders." *Id.* at 2562-2563. See also *id.* at 2563 (text of Article 33.2 "limited to those already in the country" because Article 33.1 "obligated the signatory state only with respect to aliens within its territory"); *id.* at 2563-2564 (phrase "expel or return ('refouler')" limits Article 33.1 to aliens "already present in the host country" or "at a border" and thus "already within the territory"); *id.* at 2567 (negotiating history shows "general consensus" that right of non-refoulment applies "only to aliens physically present in the host country").

[9] Petitioners' reliance (Pet. 23) on *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950), is therefore misplaced. *Wong Yang Sung* addressed the rights of aliens subject to deportation hearings in the United States. It did not extend due process or other rights to aliens outside this country. Indeed, although the INA confers procedural rights on excludable aliens who have reached a port of entry, such individuals have no constitutional due process rights in connection with their exclusion proceedings. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950). An alien who has not reached this country's borders or a port of entry cannot have a greater claim to due process than an "excludable alien" who has physically reached our shores.

government conferred upon them a constitutionally protected liberty or property interest in remaining at Guantanamo that could not be taken away without due process of law (including the right to counsel). The court of appeals correctly rejected that argument. Pet. App. 23a-24a. This Court has similarly rejected the contention that the Fifth Amendment applies to aliens outside the United States. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (discussing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)). Even if the Fifth Amendment applied to migrants located outside the United States, moreover, providing safe haven to such migrants creates no protected property or liberty interests that could trigger the applicability of the Due Process Clause. And even if the Due Process Clause did apply in that setting, that Clause would not give rise to a right to the assistance of counsel in connection with immigration determinations at a military base outside the United States. Cf. *Wolff* v. *McDonnell*, 418 U.S. 539, 570 (1974); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-326 (1985).

Petitioners also rely (Pet. 23-24) upon a vacated district court ruling from the Eastern District of New York[10] and on the Second Circuit's decision in *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992), vacated as moot *sub nom. Sale*

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[10] *Haitian Ctrs. Council, Inc.* v. *Sale*, 823 F. Supp. 1028 (1993), vacated by Stipulated Order Approving Class Action Settlement Agreement (E.D.N.Y. Feb. 22, 1994). That vacated district court judgment was premised on the erroneous view that the Due Process Clause applied on Guantanamo, ignoring that Guantanamo is not part of United States territory and that this Court has held that the Due Process Clause does not apply to aliens outside the United States.

v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) (*Sale II*). As petitioners acknowledge (Pet. 24), however, the Second Circuit's ruling was vacated by this Court as moot, and it therefore has no precedential effect. See *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563, 578 n.12 (1975). The Second Circuit's analysis, moreover, has been substantially undermined by this Court's intervening decision in *Sale I*. In finding a due process right for "screened-in" migrants (*i.e.*, those who had been determined to have a colorable claim of refugee status), the Second Circuit relied on its view that Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6276, 189 U.N.T.S. 176, and Section 243(h) of the INA, 8 U.S.C. 1253(h), applied to alien migrants outside of the United States. See *McNary*, 969 F.2d at 1344-1345, 1346 n.16. This Court subsequently held in *Sale I*, however, that Section 243(h) and Article 33 do not apply outside the United States. See 113 S. Ct. at 2559-2567; pages 14-16, *supra*.

In any event, even the Second Circuit agreed that the Due Process Clause was not triggered by the act of "transport[ing] * * * interdicted [migrants] to Guantanamo Bay." 969 F.2d at 1345. Under the Second Circuit's analysis, it was the act of "screening in" a migrant (*i.e.*, finding a colorable claim of refugee status) that rendered the Due Process Clause potentially applicable. *Ibid.* No refugee determination or screening has taken place with regard to the migrants in the present case. See Pet. App. 23a-24a (distinguishing *McNary* on the ground that transportation to safe haven is not the equivalent of refugee screening). The fact that petitioners have

been permitted to stay in "safe haven" does not create any enforceable rights or effect any legally significant change in status; it merely reflects a discretionary, humanitarian policy being carried out by the United States. See R.E. 257, 293-294. There is no legal entitlement to be brought to "safe haven" at Guantanamo; there is no legal entitlement to remain there; and the allowance of safe haven certainly confers no enforceable right to be brought to and paroled into the United States.

iii. The court of appeals correctly held (Pet. App. 18a-20a) that the naval base at Guantanamo is located on the sovereign territory of Cuba, not on United States territory. As the court of appeals recognized (*id.* at 3a n.1, 19a), the naval base occupies that foreign land pursuant to a lease agreement with Cuba. The lease grants the United States the right to use and occupy Guantanamo and adjacent water areas. In the agreement, however, the parties explicitly recognize "the continuance of the ultimate sovereignty of the Republic of Cuba over those land and water areas." Agreement between the United States of America and the Republic of Cuba for the Lease (Subject to Terms to be Agreed Upon by the Two Governments) to the United States of Lands in Cuba for Coaling and Naval Stations, Art. II (Feb. 23, 1903); 6 C. Bevans, *Treaties and Other International Agreements of the United States of America: 1776-1949*, at 1113-1114 (1971). The court of appeals correctly concluded that the authority exercised by the United States at Guantanamo derives from that agreement, not from any claim of sovereignty.[11]

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[11] The court of appeals also correctly recognized that the military installations in Panama are located on the sovereign

iv. Contrary to petitioners' hyperbole, the court of appeals did not hold that Guantanamo is a "rights-free" zone (Pet. 24), where the United States government could freely punish United States citizens for engaging in religious worship (Pet. 18). Rather, the court of appeals held that alien migrants outside the United States have no Fifth Amendment due process rights, and that neither Article 33 nor the INA entitles such aliens to meet with counsel before being repatriated.[12] Petitioners' contention that the Eleventh Circuit's decision contains "overbroad dicta" (Pet. 25) provides no basis for this Court's plenary review, and thus no basis for vacatur of the court of appeals' judgment.

v. Petitioners argue (Pet. 18-22) that the government impermissibly prevented the legal service organizations from exercising their asserted First Amendment rights to associate with Cuban migrants. The court of appeals correctly held that the First

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territory of Panama. The Panama Canal Treaty of 1977, 33 U.S.T. 39, recognized the Republic of Panama's sovereignty over and the application of Panamanian law in the area that was formerly the Canal Zone. The Treaty provides that Panama is the "territorial sovereign" over the land used for the military installations (Art. III, ¶1; 33 U.S.T. 50), and further states that "the law of the Republic of Panama shall apply" in such areas (Art. IX, ¶1; 33 U.S.T. 61).

[12] Petitioners contend (Pet. 22) that the court of appeals' decision permits officials at Guantanamo "deliberately to terrorize" and "starve" alien migrants detained outside of the United States. That emphatically is not the case. The proscriptions in the Uniform Code of Military Justice, 10 U.S.C. 877 *et seq.*, as well as provisions of the U.S. criminal laws made applicable by 18 U.S.C. 7, protect against abuse by military and civilian personnel who assist in the care of the migrants at Guantanamo.

Amendment does not confer upon lawyers any special right of access to aliens at a military base abroad.

"Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). Assuming, *arguendo*, that under some circumstances access to U.S. military bases abroad might be subject to some form of First Amendment forum analysis, the naval base at Guantanamo is assuredly not a public forum. The Executive Order that established the naval base, and the regulations that govern its use, place stringent restrictions on civilian entry. See Exec. Order No. 8749, 3 C.F.R. 209 (1941 Supp.); 32 C.F.R. Pt. 761. Apart from the rare instance where a portion of a military base is freely open to civilian traffic (see *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam)), military bases are nonpublic fora, even where they have been opened to the public for special purposes. See *United States* v. *Albertini*, 472 U.S. 675 (1985); *Greer* v. *Spock*, 424 U.S. 828, 837-838 (1976); *Brown* v. *Palmer*, 944 F.2d 732, 735-739 (10th Cir. 1991) (en banc).

Even in the domestic context, the government may restrict speech in a nonpublic forum based upon "subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806; see also *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The government's actions here fully satisfied that standard. Petitioner legal service or-

ganizations were granted the same level of access to Guantanamo as other similarly situated groups. Under Department of Defense policy, individuals or organizations may obtain limited access to migrants on Guantanamo (*i.e.*, visits of one or two days) if such access would further the needs of the migrants and would not impair the military in carrying out its responsibilities. R.E. 348-350. The policy provides that "all visitors are subject to the same procedures and restrictions" regardless of viewpoint. R.E. 352. The government's policy even establishes a preference for "humanitarian organizations, human and legal rights organizations and similar organizations serving the immediate needs of the migrant community." R.E. 348. Thus, the government provided lawyers and legal rights groups access to the Base under a reasonable, viewpoint-neutral policy.

There is no basis for petitioners' claim (Pet. 18-21) of impermissible viewpoint discrimination. Petitioners premised that claim on the fact that certain nongovernmental organizations, such as the World Relief Organization and Amnesty International, were permitted greater access to Guantanamo. Amnesty International was allowed such access for the purpose of facilitating the federal government's viewpoint-neutral goal of demonstrating to the public that its operations on Guantanamo satisfy the standards of an independent, well-respected human rights organization. See Dep. of Stewart Moneymaker 23 (Nov. 22, 1994); see generally *id.* at 19-31. The World Relief Organization was permitted to maintain a long-term presence on Guantanamo because of its ability to assist the government in caring for the migrants, as demonstrated by its experience and expertise in performing similar tasks worldwide. See R.E. 350;

Dep. of Ronald W. Zaperach 53-58 (Nov. 22, 1994); Moneymaker Dep. 23-25. The government's decision to accept their assistance does not constitute viewpoint discrimination. See *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 134-135 (1977); *Thornburgh* v. *Abbott*, 490 U.S. 401, 415-416 & n.13 (1989). Petitioners also asserted that it was viewpoint discrimination to permit INS and other government officials to communicate with the migrants while denying private attorneys a right of access. The government's exercise of its own functions, however, cannot create an obligation to provide third parties with a right under the United States Constitution to obtain access to a military base in a foreign country.[13]

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[13] Petitioners rely (Pet. 20-21) upon an alleged conflict with the Eleventh Circuit's prior decision in *Jean* v. *Nelson*, 727 F.2d 957 (1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985). An intra-circuit conflict would not warrant this Court's review. Petitioners raised this alleged conflict before the Eleventh Circuit in their petition for rehearing with suggestion of rehearing en banc, which the court denied. In any event, *Jean* (which involved aliens detained within the United States) is consistent with the decision in this case. The Eleventh Circuit in *Jean* did not resolve the First Amendment issue presented there, but instead remanded the matter so that the district court could address the issue in the first instance. See 727 F.2d at 983. In the course of its opinion, the court of appeals noted that the First Amendment provides a general right to "inform individuals of their rights." *Ibid.* The Eleventh Circuit in the present case expressly recognized that same general right. Pet. App. 28a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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IN THE

Supreme Court Of The United States

October Term, 1995

Cuban American Bar Association, Inc., et al.,

Petitioners,

vs.

Warren Christopher, Secretary of State, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO GOVERNMENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.6, petitioners hereby reply to the Government's Opposition to their Petition for a Writ of Certiorari. Nothing in that Opposition casts doubt on the conclusion that the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit should be vacated, because the case has become moot through the Government's unilateral actions.

I. This Case is Moot

Respondents' May 2, 1995 policy statement announcing its unilateral decision to parole in all Cuban refugees from Guantánamo renders this case moot. Because the District Court never certified the Cuban detainees as a class, the only refugees involved in the instant lawsuit were ten individual detainees, of whom only two still remain on Guantánamo: Nestor Rodriguez Labori and Jovani Miguel Fiffe Pino. The Government claims that the case is not moot, solely because these two have "not yet entered into the parole process," a process over which respondents obviously exercise exclusive control. Br. for Respondents in Opposition ("Opp.") at 9. Yet in fact, both individuals have already completed *all relevant process*, as both have now participated in a campwide "lottery" of parolees held in August, and have drawn their final departure dates from Guantánamo.[1] Presumably, respondents could not keep this case artificially alive by *deliberately* delaying the last two plaintiffs' departure until after this Court disposed of their cert petition. Neither should respondents avoid mootness by unilaterally deciding when and where Labori and Pino should be paroled into the United States, but setting those dates so that they arise only after the Court disposes of this petition.

Respondents seek to avoid mootness by asking this Court "to treat the district court's order as *de facto* certifying the class action," although

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[1]Just this week, the MIAMI HERALD reported that on August 11, 1995, the U.S. military conducted a supposedly random "lottery system [among the eight remaining camps on Guantanamo] to determine who among some 10,000 rafters would leave the camps first...." Mirta Ojita, *Guantanamo's camps could be empty as early as January*, MIAMI HERALD, Sept. 16, 1995, at 3B. Apparently, residents of Guantanamo Camps One and Two have already arrived in the United States. From now on, "flights will continue at the same pace –three flights a week each carrying 172 rafters." *Id.* We are informed by their families that both Pino and Labori participated in the putative lottery, that Pino is at the fourth camp in line to leave Guantanamo, with a November 1995 departure date, while Labori is in the fifth camp in line to leave, with a December 1995 departure date.

conceding that our class "was not formally certified by the district court." Opp. at 9. This claim is refuted by the Government's repeated insistence throughout that this suit is *not* a class action.[2] Nor can the Government reconcile its newly minted claim that Labori and Pino have become uncertified, *de facto* class representatives with its claim below that "the legal status of the named plaintiffs here is far different from that of any person who may have reached the United States," a category that will shortly include *all* of the Guantánamo detainees. Reply Brief for Appellants to the Eleventh Circuit at 10.[3]

Finally, the decision below is undeniably moot as regards the Cuban Refugee Service Organization ("CRSO") Petitioners, who no longer require nor seek access to Guantánamo now that their detainee clients are being released. As the District Court's opinion on the temporary restraining order makes clear, the CRSO petitioners sought First Amendment access to their individual detainee clients for one purpose only: to counsel them regarding their chances of coming to the United States and any decisions to repatriate "voluntarily" to Cuba.[4] Now that all Guantánamo detainees have departure

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[2]The Government's brief to the Eleventh Circuit refers to the group as a "putative class," Brief for Appellants to the Eleventh Circuit ("Br. App.") at 19, and identifies the plaintiffs as "1) *several migrant Cubans*, in the safe haven provided by the United States at its military base in Guantanamo, Cuba and Panama, who have *not* asked to be returned to their homes in Cuba; and 2) several legal services organizations." *Id.* at 8-9 (emphasis added). The Government reminded the Eleventh Circuit that "[t]he class has not been certified and the named plaintiffs clearly fail the requirements of Rule 23 of the Federal Rules of Civil Procedure." *Id.* at 18. Far from insisting that the individual plaintiffs represented all detainees, the Government argued that those individuals *lacked standing* to represent certain Cuban migrants detained on Guantanamo who had declared their wish to repatriate to Cuba. *Id.* at 13, 17-18.

[3]Similarly, respondents' disingenuous claim that we are "free to attempt to add additional migrants as class representatives" to keep class claims alive, Opp. at 9, omits the fact that an Eleventh Circuit order dated December 19, 1994 "stayed all further proceedings in the district court, including discovery," as well as all further efforts to seek class certification. *CABA v. Christopher*, Pet. App. at 11a.

[4]See Pet. App. at 36a-37a ("the plaintiffs' main contention, for purposes of this Motion, is that the government is denying the attorneys their First amendment rights and the detained plaintiff refugees substantive and due process rights by denying them access to their attorneys. Consequently, the plaintiffs argue that the 'voluntary'

dates to come to the United States, their lawyers no longer have any need for access or counseling on Guantánamo.

The fact that some Cuban detainees still on Guantánamo may have originally requested these service organizations' representation, Opp. at 9-10, cannot keep the First Amendment access question alive. The Government's May 2 policy change entirely mooted those requests, and eliminated any need for the legal service organizations to travel to Guantánamo to meet with and counsel these individuals. Because these individuals, like Labori and Pino, will soon arrive in the United States, their needs for counseling, as well as the attorneys' First Amendment rights, can be addressed by meetings that are held here.

II. The Government States the Wrong Standard for Evaluating Vacatur

The Government concedes that "[w]here it appears upon appeal that the controversy has become entirely moot, it is the *duty of the appellate court to set aside the decree below.*" *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)(per curiam), *cited in* Opp. at 11 (emphasis added). Nor does the Government deny that just last Term, in *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 115 S.Ct. 386, 392-393 (1994), this Court ruled that "vacatur *must* be granted where mootness results from the unilateral action of the party who prevailed in the lower court." *Id.* at 390 (emphasis added). Nevertheless, respondents disingenuously seek to avoid that rule by arguing the mootness of the case will not result from "'unilateral' actions by the government" because "the parole of Cuban migrants (including any of the named plaintiffs) into the United States reflects a volitional act on their part," i.e., their willingness to come to the United States. Opp. at 14 n.6.

In fact, Pino and Labori have been ready and willing to engage in such a "volitional act" for more than a year, since they first fled to the United States from Cuba by boat in the summer of 1994. The only reason they have not entered the United States, and under the Cuban Adjustment Act already been granted permanent resident status, is that Respondents

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repatriation of the refugees cannot in fact be voluntary absent the advice of counsel and informed consent." (footnote omitted)); *id.* at 37a n.3 ("At this stage, the court is only considering the issue of right to access and whether the Cuban refugees are being denied the opportunity to be fully informed, thus, preventing voluntary repatriation.").

interdicted them on the high seas, held them in detention for more than a year, and will now apparently release them only *after* this Court has disposed of our petition for certiorari. For more than a year, the Government unilaterally restrained and restricted plaintiffs' freedom. It is the Government's unilateral lifting of that restraint and scheduling final departure dates for the two plaintiffs -- not any acts of Labori's or Pino's -- that renders this case moot, and appropriate for this Court's vacatur.

Citing only past practices of their own office – and a vacatur standard they concede "this Court has never expressly endorsed," Opp. at 11-13 – respondents claim that this Court cannot vacate a judgment below without first fully evaluating the certworthiness of the pending petition to determine whether it meets S. Ct. Rule 10's standard for plenary review. Respondents offer scant evidence that their threshold test has ever governed this Court's vacatur practice, which was designed in part precisely to *avoid* the need to make such certworthiness determinations.[5]

Nor does it make sense that this Court, when confronted with a case

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[5]The treatise upon which respondents rely says only that in recent years, the Court has "seemingly accepted" such suggestions from the Solicitor General. R. Stern, E. Gressman, S. Shapiro & K. Geller, SUPREME COURT PRACTICE 724 (7th ed. 1993). But if this Court has accepted this position, "it has never said" so. *Commodity Futures Trading Comm'n v. Bd. of Trade*, 701 F.2d 653, 657 (7th Cir. 1983) (Posner, J.)). In support of this Court's "seeming acceptance" of their own briefs, respondents cite extensively to three cases in which this Court in fact rejected the Government's position on vacatur en route to disposing of the case. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S.Ct. 425 (1993)(per curiam) (dismissing certiorari as improvidently granted without reaching the merits of the position argued for by the Government); *U.S. Bancorp Mortgage Corp. v. Bonner Mall Partnership*, 115 S.Ct. 386 (1994) (invalidating routine practice of vacating decisions pursuant to settlement pending appeal and rejecting central proposition argued for by Government); *Keough v. American Policyholders Ins. Co., cert. denied*, 114 S.Ct. 682 (1994) (refusing to vacate despite Government's urging that a prior decision should be vacated because the case would have warranted the Court's review had it remained live). The very treatise upon which the Government relies elsewhere notes that Supreme Court "orders vacating cases as moot do not say whether the Court might have been likely to grant certiorari," R. STERN, ET AL., *supra*, at 724 n.29, and pronounces that "the practice of vacating the judgment below [upon mootness] is binding on the courts of appeals *as well as the Supreme Court.*" *Id.* at 723 (emphasis added).

mooted on appeal, must invariably perform an *ex post facto* thought experiment as to whether the case *would have* merited certiorari had it not been mooted. Such a rule would condemn this Court to endless summary line-drawing between some parties who would be deemed "validly" to have lost their chance at reviewability, and others similarly situated who kept that chance. Precisely to avoid such line-drawing, this Court has long followed a practice of regularly vacating cases that become moot after the court of appeals renders its judgment and before the Court grants the petition for writ of certiorari.[6]

Vacatur is particularly appropriate when mootness results from a change in the legal framework governing the case caused by the unilateral action of the party who prevailed below. "[I]n instances where the mootness is attributable to a *change in the legal framework governing the case* ... [this Court's] practice is to vacate the judgment and remand for further proceedings in which the party may, if necessary, amend their pleadings or develop the record more fully." *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (482) (1990) (emphasis added).[7] No less than a legislative enactment, respondents' May 2nd policy change has similarly resolved the immediate controversy and changed the legal framework of the case. The Government now intends to parole in all Cubans from Guantánamo, where before none of the detained Cubans could even apply for parole and asylum status. This

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[6]See, e.g., *Sivley v. Soler*, 113 S.Ct. 454 (1992) (granting, vacating, and remanding to the Court of Appeals for the Ninth Circuit with directions to dismiss); *Yellow Freight System, Inc. v. United States*, 113 S.Ct. 31 (1992) (same); *City Gas Co. v. Consolidated Gas*, 499 U.S. 915 (1991) (same); *Dillon v. Allegheny Corp.*, 499 U.S. 933 (1991) (same); *Onwuasoanya v. United States*, 488 U.S. 920 (1988) (same); *SEC v. Board of Trade*, 459 U.S. 1026 (1982); *Alabama v. Davis*, 446 U.S. 903 (1980) (same); *Hopper v. Barnett*, 439 U.S. 1041 (1978) (same). In all these cases, the mooting event occurred *before* this Court granted the petition for a writ of certiorari, and it "seems a fair inference, ... that most of them involve mooting events occurring after the court of appeals decision." 13A Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure: Civil* § 3533.10 n. 31 (1984).

[7]Far from challenging this conclusion, the Government's *amicus* brief in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S.Ct. 425 (1993) at 14, acknowledged that vacatur for mootness is appropriate "when a legislative enactment resolves the immediate controversy."

legal change renders vacatur fully appropriate without regard to whether the case would ever have warranted plenary review on *certiorari*. Nor do respondents convincingly distinguish the case most directly on point: this Court's decision granting, vacating, and remanding a case involving facts nearly identical to these: the Second Circuit's decision in *Haitian Ctrs. Council v. McNary*, ("*McNary II*") 969 F.2d 1326 (2d Cir. 1992), *vacated as moot on other grounds sub nom., Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993). As our petition notes, at 12-13, *McNary II* raised an issue identical to that here: whether the First Amendment required that American lawyers be given access to more than 200 Haitian clients then being detained on Guantánamo. As here, the Government chose to release the Guantánamo detainees before this Court acted on the Solicitor General's petition, and twice told this Court that the case having "become moot prior to the Court's disposition of the petition for certiorari, *the proper course would be to vacate the decision of the Second Circuit, not to deny the petition. See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950)."[8]

If, as the Government claims, this Court based its vacatur in *McNary II* on an implicit finding that the First Amendment issue was certworthy, surely the same issue suffices here to support the grant of the petition, vacatur and remand with instructions to dismiss the judgment below.[9]

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[8]Reply Brief for the Petitioners at 10, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) (No. 92-528) (emphasis added), Pet. App. at 79a. Accord, Supplemental Brief for the Government Petitioners at 3, *Sale v. Haitian Ctrs. Council, Inc.*,113 S.Ct. 3028 (1993) (No. 92-528) ("the proper disposition in the event of mootness is not to deny the petition, but rather to grant the petition and *vacate* the judgment of the court of appeals as moot. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950)") (emphasis added), Pet. App. at 80a.

[9]If anything, the circuit split on the First Amendment issue has intensified since *McNary II*, now that both the Second Circuit and the U.S. District Court for the Eastern District of New York have held for the legal services organizations on the issue, while the Eleventh Circuit in this case ruled the opposite way. Compare *McNary II* and *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (vacated by settlement), with *Cuban American Bar Ass'n, et. al. v. Christopher, et al.*, 43 F.3d 1412 (11th Cir. 1995).

III. Equitable Factors Require Vacatur Of The Eleventh Circuit's Erroneous Decision, Which Misapplied Controlling Circuit And Supreme Court Precedents

As this Court made clear last term in *U.S. Bancorp*, "a party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Id.* at 391-92. The question on vacatur is not whether a now-dead case was ever certworthy, but whether equitable factors now demand vacatur.[10] As our petition fully demonstrated, Pet. at 15-26, at least four such factors exist:

A. *Judicial Even-Handedness:* Respondents are U.S. Government officials, with broad, unilateral power to moot suits brought against them via policy decisions implemented through Executive announcement and without Congressional approval. Throughout the Haitian and Cuban refugee litigations, the Government has exploited its unique position as a litigant and policymaker to invoke the *Munsingwear* doctrine to avoid the adverse precedential effect of lower court decisions. Pet. at 16. Particularly when this Court has previously exercised its vacatur power to void other circuit precedent on an issue, equity requires that it vacate the decision under review to ensure that the Government cannot benefit from unreviewed advantageous precedent, should it elect to engage in similar conduct in the future.

B. *First Amendment*: The Government seeks to minimize the Panel's startling declaration that "the First Amendment does not apply to the migrants or to the [American] lawyers at Guantánamo Bay...." Pet. App. at 29a. Opp. at 20. Read literally, this holding would permit the Government to bar American citizens on Guantánamo not just from speaking to their Cuban clients, but also from speaking to other Americans there, from writing open letters, criticizing the President, or even engaging in religious worship. By refusing even to consider Petitioners' First Amendment claim of impermissible viewpoint-based discrimination, Pet. App. at 29a, the Court of Appeals effectively licensed the Government to engage in intentional viewpoint-based discrimination against U.S. lawyers on Guantánamo.

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[10]Even accepting *arguendo* the Government's claim that this Court should evaluate the certworthiness of an entirely moot case, as our petition demonstrated, this case also easily meets that standard. Pet. at 15-26.

The Government denies that it discriminated against Cuban Legal Services Organizations, citing general access to Guantánamo it granted to Amnesty International and World Relief Organization. Opp. at 22. Yet neither of these organizations was afforded what our clients sought: one-on-one interviews with refugee clients for the purpose of giving them legal advice.[11] By granting some organizations greater access based on their organizational purpose (which was not to render legal advice), the Government necessarily discriminated against organizations such as CABA, who were barred precisely *because* their organizational purpose was to advise and counsel the detainees. Such differential treatment based on organizational purpose squarely violates this Court's directive that the Government may not discriminate against speech to suppress a disfavored viewpoint.[12]

Nor can the Government repeal the First Amendment just because the speech occurs on a military base,[13] or outside United States territory.[14] Even in a nonpublic forum, the Government may not "suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983). Finally, the Government makes no effort to reconcile the Eleventh Circuit's ruling with this Court's decision last Term in *Florida v. Went for It, Inc.*, 115 S. Ct. 2371 (1995), which reaffirmed that the political (as opposed to commercial) speech of attorneys merits full First Amendment protection.[15] Vacatur is

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[11]*See* Dep. of Stewart Moneymaker at 25 (Nov. 22, 1994) (Amnesty International was "absolutely not" to provide legal services to the migrants); Dep. of Robert Zaperach 53-58 (Nov. 22, 1994) (World Relief Organization was allowed onto Guantanamo not to give legal advice, but because of its ability to assist the government in caring for the migrants).

[12]*See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141, 2147-48 (1993) ("'[T]he First Amendment forbids the Government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'").

[13]*Flower v. United States*, 407 U.S. 197, 198-99 (1972) (Government cannot abridge First Amendment rights of civilians on military base).

[14]*Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (First Amendment's religion clause applies extraterritorially).

[15]See 115 S.Ct. at 2381 (O'Connor, J.) ("we will accord speech by attorneys on public issues and *matters of legal representation the strongest protection our Constitution has to offer*") (emphasis added).

thus warranted, if only to require the Panel to reconsider its ruling in light of this Court's intervening decision in *Went For It, Inc.*.

C. *Legal Rights of Detainees on Guantánamo:* While defending particulars of the Eleventh Circuit opinion, the Government nowhere defends the full implications of Panel's startling ruling that Cuban and Haitian refugees on Guantánamo and Panama "are without legal rights that are cognizable in the courts of the United States." Pet. App. at 31a. As we earlier noted, this language would theoretically free American officials deliberately to terrorize those refugees, to starve them, to subject them to forced abortions and sterilizations, and to discriminate against them based on the color of their skin. U.S. officials could apprehend innocent refugees inside U.S. territorial waters and confine them forever, without legal rights and any processing, in punitive offshore detention camps under exclusive U.S. jurisdiction and control.

The Government now denies that this could legally happen, citing provisions of the Uniform Code of Military Justice, 10 U.S.C. § 877 and 18 U.S.C. § 7, to bar officials at Guantánamo from mistreating alien detainees. Opp. at 20 n.12. But this argument establishes, rather than disproves, our claim that Guantánamo cannot be a "rights-free zone" to which no U.S. law applies. If, as the Government now concedes, U.S. *statutes* reach extraterritorially to prohibit military personnel on Guantánamo from committing murder (10 U.S.C. § 918), manslaughter (10 U.S.C. § 919), maiming (10 U.S.C. § 924), unlawful detention (10 U.S.C. § 897), or conduct unbecoming an officer and a gentleman (10 U.S.C. § 933) on Guantánamo (Opp. at 20 n.12), how can the Eleventh Circuit insist that the First and Fifth Amendments do not apply there?

At a minimum, a ruling of such breathtaking sweep should have been fully briefed and argued, based on a complete District Court record. Instead, the Panel announced its overbroad dicta on an expedited interlocutory appeal in which the narrow issue before the Panel was the refugees' right to resist coerced repatriation. The Government's own arguments thus provide further basis to doubt the Eleventh Circuit's judgment, and for this Court to exercise its equitable power of vacatur.

D. *Departure from the Accepted Course of Judicial Proceedings:* Finally, vacatur is warranted because the Panel blatantly departed from the accepted course of judicial proceedings by ignoring its own en banc opinion in *Jean v. Nelson*, 727 F.2d 957, 981-82 (11th Cir. 1984). Pet. at 20-21. *Jean* held that detainees' American "counsel have a first amendment right

to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration...." *Id.* at 983. Without following, distinguishing, or even mentioning that precedent, the First Amendment part of the Panel opinion held that American attorneys have *no* independent First Amendment right to counsel their clients unless "the Cuban ... migrants have any of the statutory or constitutional rights ... that might sustain the attorneys' claims to [a First Amendment] right of association," Pet. App. at 29a, the opposite of what *Jean* had in fact held. See Pet. at n. 11.[16]

By flouting Eleventh Circuit precedent, the Panel violated not just internal Circuit law, but also this Court's core First Amendment precedents. The Panel's demand that a *client* have an underlying legal claim before the First Amendment applies to his *lawyer's* speech denies the First Amendment rights of legal services organizations to engage in the very litigation that might lead to judicial recognition of their members' legal rights.

In sum, the important public and national interests at stake, the acknowledged split between the decision below and prior decisions of courts in the Second Circuit, the Panel's erroneous rulings on important questions of constitutional law, and the Panel's gross departure from the accepted course of judicial proceedings all establish both the "certworthiness" that the Government erroneously demands, and Petitioners' equitable entitlement to the remedy of vacatur.

CONCLUSION

For the foregoing reasons and those set forth in our petition, the petition for a writ of certiorari should be granted, the Eleventh Circuit's opinion and order of January 18, 1995 and judgment of April 27, 1995 should be vacated as moot under *U.S. v. Munsingwear*, 340 U.S. 36, 39-41 (1950), and the case remanded to the Eleventh Circuit with instructions to dismiss the judgment.

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[16]The Government now claims that the Eleventh Circuit in *Jean* "did not resolve the First Amendment issue presented there, but instead remanded the matter so that the district court could address the issue in the first instance." Opp. at 23. In fact, the Court of Appeals did not remand the case to the district court to address the First Amendment issue in the first instance, but solely to develop a *factual record* with regard to the constitutional claim that it had just upheld. *See* 727 F.2d at 983-84.

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